Jurisdictional Statement

81-1267

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No. .....

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

UNION-MECHLING ~~UNION BARGE LINE~~ CORPORATION, *Appellant*

v.

~~DAVID C. HARDESTY, JR.,~~
~~Tax Commissioner of the State of West Virginia,~~
~~Revived in the name of~~ HERSCHEL R. ROSE, III,
Tax Commissioner, etc.,
Appellee.

ON APPEAL FROM THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED[1]

1. Whether W. Va. Code §11-12A-3 is violative of the commerce clause or due process clause of the United States Constitution when used as a basis to tax income derived by a barge line corporation from the interstate transportation of freight on the navigable waterways of the United States located in part within the boundaries of the State of West Virginia when the barge line corporation maintains no office or place of business within the state and has no employees located within the state.

2. Whether W. Va. Code §11-12A-3 is violative of the commerce clause or due process clause of the United States Constitution when used as a basis to tax income derived by a barge line corporation from the interstate transportation of freight on the navigable waterways of the United States located in part within the boundaries of the State where there is an insubstantial relationship between the barge line corporation's contacts or presence within the State and the benefits, opportunities and protections offered by the taxing State.

3. Whether a direct tax upon the interstate movements of a barge line corporation through waters located within the boundaries of the taxing state can be constitutionally sustained by virtue of the nexus provided by the miniscule intrastate activities of the same barge line corporation.

PARTIES BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

The caption above contains the names of all parties before the Supreme Court of Appeals of West Virginia.

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[1]The Appellant, Union Barge Line Corporation, became Union-Mechling Corporation in 1973 and is a subsidiary of Dravo Corporation. It is also an affiliate of Lemont Harbor and Fleeting and Services, Inc.

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REPORTED OPINIONS BELOW

The opinion of the West Virginia Supreme Court of Appeals is reported at 282 S.E.2d 240 and is styled *Western Maryland Railway Co. v. Goodwin*. (Appendix A, *infra*).

JURISDICTION

The proceeding below began with an assessment of tax under the West Virginia Carrier Income Tax, W. Va. Code, Chapter 11, Article 12A. The assessment was upheld by the Tax Commissioner of the State of West Virginia upon evidence taken at an administrative hearing. Upon timely appeal to the Circuit Court of Kanawha County, the Tax Commissioner's decision was reversed and the assessment was expunged. The Circuit Court's decision was reversed by the Supreme Court of Appeals of West Virginia and judgment was entered in favor of the Appellee.

The judgment of the Supreme Court sought to be reviewed was entered on July 17, 1981. Subsequently, the Appellant petitioned for a rehearing, which petition was denied by order entered October 8, 1981. The Appellant then filed a notice of appeal to this Court with the Supreme Court of Appeals of West Virginia on the 9th day of December, 1981.

This appeal is being docketed in this Court within ninety (90) days from the denial of the rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (2) in that the Appellant has challenged the application of the W. Va. Code §11-12A-3 to its operations by the State of West Virginia on federal constitutional grounds and the tax was found to be constitutional by West Virginia's highest court.

CONSTITUTIONAL PROVISIONS AND STATUTES

The constitutional provisions and statutes involved in the case are cited below and their full text is set forth in Appendix H, *infra*.

Article I, Section 8, Clause 3 of the United States Constitution.

Fourteenth Amendment, United States Constitution, Section 1.

Chapter 11, Article 12A, Section 2 of the Code of West Virginia of 1931, as amended.

Chapter 11, Article 12A, Section 3 of the Code of West Virginia of 1931, as amended.

STATEMENT OF THE CASE

At issue in the instant appeal is the constitutionality of the tax imposed by Section 3 of the Carrier Income Tax, W. Va. Code §11-12A-3, insofar as that statute applies to the Appellant's operations upon navigable rivers located within West Virginia. While W. Va. Code §11-12A-3 is the only provision challenged, it is necessary to briefly discuss the entire West Virginia Carrier Income Tax to place the issues presented in this appeal in their proper context.

The Carrier Income Tax is a tailored tax[2] imposed upon selected carriers and is a companion to the West Virginia Business and Occupation Tax, West Virginia Code, Chapter 11, Article 13. In 1933, the West Virginia Legislature excluded selected carriers from the State's Business and Occupation Tax, undoubtedly because of the difficulties then extant in seeking to impose an

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[2]See footnote 15, *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288 (1977) describing "tailored taxes" which must receive the careful scrutiny of the courts, among other reasons, because of a potential lack of relationship to the services provided by the State.

unapportioned gross income tax upon interstate carriers,[3] and subjected them to a "Privilege Tax on Certain Carrier Corporations." See, Acts of the Legislature, 1933 Extraordinary Session, Chapter 33. In its general form, the 1933 Act imposed upon certain carriers, including water carriers, a privilege tax measured by intrastate gross income and a privilege tax measured by apportioned interstate gross income. In *American Barge Line Co. v. Koontz*, 136 W. Va. 747, 68 S.E.2d 56 (1951), the West Virginia Supreme Court invalidated the privilege tax measured by apportioned interstate gross income, as applied to a water carrier, like Appellant, which had no office, place of business or employees in the State, as violative of the federal constitution but sustained the tax as applied to intrastate gross income. The legislature thereafter amended Article 12A, Chapter 11 to impose a privilege tax measured by apportioned interstate net income. This amended statute was, in turn, invalidated as unconstitutionally applied in *State ex rel. Battle v. Baltimore & O.R.R.*, 149 W.Va. 810, 143 S.E.2d 331 (1965), cert. den. 384 U.S. 970 (1966). As a result, in 1967, the Legislature repealed the "Privilege Tax on Certain Carrier Corporations" but, simultaneously "substantially reenacted" the same in the form of the present Article 12A. *Chesapeake & Potomac Telephone Co. v. State Tax Department*, —— W. Va. ——, 239 S.E.2d 918 (1977). The principal change made was to remove the word "privilege" wherever it appeared in the repealed statute.

The present Article 12A, like its predecessors, is a two tiered tax in that it provides for a gross income tax on business beginning and ending in West Virginia

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[3]*See, e.g., Eureka Pipeline Co. v. Hallanan*, 257 U.S. 265 (1921) invalidating the West Virginia business and occupation tax as applied to a pipeline carrier; *see also, New Jersey Bell Telephone Co. v. State Board of Tax and Audit*, 280 U.S. 338 (1930) as to a telephone carrier.

and an apportioned income tax on interstate net income.[4] Only the net income tax applied to Appellant's interstate business is at issue in this appeal.

The Appellant is a Pennsylvania corporation which operates a barge line for the transportation of freight upon the navigable waterways of the United States and in particular, Gulf intercoastal waterways, the Mississippi River, the Ohio River, and its tributaries including the Kanawha River. It operates on about 8,962 miles of an inland waterway system containing 14,383 miles of navigable waterways.

The Appellant maintains no office or place of business in West Virginia; it has no agent or employees stationed in the State; and has not qualified to do business in West Virginia. The Appellant is a common carrier and contract carrier and holds Certificates of Convenience from The Interstate Commerce Commission. It is licensed by the United States of America.

The operations for which the tax in despute is claimed occurred on a 277-mile stretch of the Ohio River which borders on West Virginia (generally from mile post 40 to mile post 317), and on portions of the Kanawha River within the State. These rivers have been locked, dammed, canalized and otherwise improved by the Federal Government since 1824. Beginning in 1910, the United States erected dams in the Ohio River in aid of navigation. Since 1955, it has been replacing the earlier dams with higher ones. This has caused the waters of the river to rise and permanently inundate various areas of both Ohio and West Virginia. As a result, the shores or banks of the Ohio River have

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[4]Taxes paid under the West Virginia Business and Occupation Tax, Code, Chapter 11, Article 13, and the Carrier Income Tax, Code, Chapter 11, Article 12A, may be credited by the taxpayer against the general West Virginia Corporation Net Income Tax. *See*, W. Va. Code §11-24-9. However, since Appellant has neither employees nor property in the State, it has no general corporation net income tax liability and its returns so reflect. *See*, W. Va. Code §11-24-7(d) (5).

moved westerly and easterly as the water levels have increased because of the damming and channel enlarging. Consequently, some of Appellant's traffic on the Ohio River between mile post 40 and mile post 317 occurs within the State of Ohio although no adjustment has been made for this in the State's assessment. This issue has been remanded to the Circuit Court. See footnote 7, *post*.

All river improvements are maintained solely by the Federal Government, which maintains and controls such rivers as public highways of commerce. The Appellant does not use any dock, property, facilities or service of the State of West Virginia or any of its subdivisions. In fact, there are no facilities or improvements on such rivers provided by the State. Appellant has no property such as docking facilities located within the State's boundaries.

Transportation performed by Appellant on these rivers, and principally the Ohio River, falls into three categories, to-wit: (a) freight originating at a point outside of West Virginia to a point outside of West Virginia, herein sometimes called "through traffic;" (b) freight originating outside of West Virginia destined to a point within West Virginia, or vice versa, herein sometimes called "one-point traffic;" (c) freight originating at one point in West Virginia destined to another point in West Virginia, herein sometimes called "two-point traffic."

During the year 1967 (one of the taxable years in question used as a test year in the administrative proceeding), through traffic constituted the larger portion of the Appellant's business connected with West Virginia being 1,247,554,275 miles of which 216,093,647 passed from mile post 40 through mile post 317 on the Ohio River; 958,835,729 ton miles constituted one-point traffic, either beginning or ending in West Virginia, only a portion of which represents the traffic

within West Virginia. Only 2,594,248 ton miles were two-point traffic. Additionally, Appellant moved 1,513,809,097 ton miles of freight entirely outside of West Virginia.

For the period January 1, 1967, through December 31, 1971, the Appellant reported and paid the gross income tax imposed by W. Va. Code §11-12A-2 on its two-point traffic. However, pursuant to the decision of the West Virginia Supreme Court of Appeals in *American Barge Line Co. v. Koontz*, 136 W.Va. 747, 68 S.E.2d 56 (1951), declaring a gross income tax imposed upon interstate traffic (one-point and through traffic) unconstitutional, the Appellant did not report nor pay tax upon net income generated by its one-point and through operations.

On November 17, 1972, the Tax Commissioner of the State of West Virginia, made an assessment of tax against the Appellant for Carrier Income Tax for the period January 1, 1967, through December 31, 1971. The assessed amount included sums allegedly due and owing from the Appellant under W. Va. Code §11-12A-3.

In its petition for reassessment, as amended, filed March 16, 1973, the Appellant asserted that the tax imposed by W. Va. Code §11-12A-3 violated the due process and commerce clauses of the United States Constitution because (i) there was an insufficient nexus between the operations taxed and the state; and (ii) because the tax was not fairly related to benefits provided the Appellant by the State.

Following hearings on the assessment, the Appellee issued his administrative decision (Appendix B, *infra*) affirming the assessment of carrier income tax in the modified amount of Thirty-seven Thousand Five Hundred Eighty-six Dollars and Fifty-nine Cents ($37,586.59) and waived all penalties.

As pertinent to this appeal, the Appellee sustained the constitutionality of the tax imposed on interstate business by §11-12A-3. The administrative decision asserted that *American Barge Line Co. v. Koontz*, 136 W.Va. 747, 68 S.E.2d 56 (1951), was inapplicable because the law of interstate commerce had moved in the direction of sustaining state and local taxes in recent years. The Appellee further held that the fact that the Appellant was engaged in transportation along the Ohio River (the bed of which is owned by the State of West Virginia) and the fact that the Appellant's barges frequently land on the West Virginia side of the Ohio River for loading and unloading established a sufficient nexus for the tax. In addition, the Appellee noted that the Appellant conducted a viable two-point business within the State and held that that business was sufficient to sustain the tax on the Appellant's interstate business under the "borrowed nexus" theory applied in *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977).[5]

Appellant appealed the aforesaid administrative decision to the Circuit Court of Kanawha County, West Virginia, again attacking the tax on due process and commerce clause grounds. Following briefs and argument on May 25, 1979, the Honorable Robert K. Smith, Judge of the Circuit Court of Kanawha County, West Virginia, issued a letter opinion (Appendix C, *infra*) which reversed the aforesaid administrative decision and held the carrier net income tax, as applied to the Appellant's one-point and pass-through service, void as repugnant to the commerce clause and the due process clause of the Fourteenth Amendment. The Court held that as applied to the facts of the case the

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[5]Finally, the Appellee rejected the Appellant's claim that certain of the Appellant's travel on the Ohio River was not subject to tax as a result of the fact that locks, dams and canals had over the years caused certain navigable portions of the Ohio River to be located in Ohio.

tax was unconstitutional "due to insufficient nexus and a lack of State benefits."[6]

The Court expressly rejected Appellee's "business climate" theory as untenable and rejected, also, Appellee's "borrowed nexus" theory, stating that "[i]n the first place, simply put, there is no nexus to borrow, and for a second reason, namely, such theory does not apply to a direct tax like the carrier net income tax." Pursuant to this letter opinion, the Circuit Court entered an order expunging the assessment on August 30, 1979. (Appendix D, *infra*).

On March 23, 1980, the Appellee appealed the decision to the Supreme Court of Appeals of West Virginia. In an opinion issued July 17, 1981, consolidating three separate appeals involving various facets of the Carrier Income Tax and styled *Western Maryland Railway Co.* v. *Goodwin*, reported at 282 S.E.2d 240 (Appendix A, *infra*), the West Virginia Supreme Court reversed the Circuit Court. In the Union Barge portion of the consolidated opinion, the Court held that the carrier net income tax, as applied to the Appellant's operations survived the constitutional tests of nexus and relationship to state benefits. In doing so, the Court overruled its prior decision in *American Barge Line Co.* v. *Koontz*, *supra*, and held as follows regarding nexus and state benefits.

In its generalized preliminary legal discussion, relying upon *National Geographic* v. *California Board of Equalization*, 430 U.S. 551 (1977), the Court asserted:

> Neither is it necessary for there to be a nexus between the particular in-state activities of the taxpayer and the activity sought to be taxed. Id. We conclude that purposive, revenue generating

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[6]The Court found it unnecessary to address the subsidiary issue raised by Appellant relating to apportionment for potential or actual transportation by the Appellant on the Ohio River within the State of Ohio between mile post 40 and mile post 317, referred to in footnote 5, *ante*.

> activities in the state are sufficient to render a person liable for taxes.

282 S.E.2d at 244. Applying this assertion to the Appellant's operations, the Court stated:

> Inasmuch as the question is whether there is a substantial nexus between a taxpayer and the State to support the imposition of *any* tax, the fact that the appellee does not contest the validity of taxing its wholly in-state business is at least persuasive that some nexus exists with regard to some operations.

282 S.E.2d at 252.

And to solidify its application of these principles, the Court held "[Appellant's] one-point business alone is sufficient to provide the substantial nexus necessary for taxation by the State." 282 S.E.2d at 253. In so holding, the Court relied upon *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949), upholding an *ad valorem* property tax placed upon barge companies engaged in one-point service within the taxing state.

A second prong of the Court's rationale rested upon its inferential interpretation of the facts; the Court stating that its view of the record "suggests that appellee had far more substantial contacts with this State than there were found by the Circuit Court." 282 S.E.2d at 252. The "suggestions" enumerated by the Court were several.

First, the Court held that because the Appellant's two-point operations were generally done to accommodate interstate customers or other carriers, its "in-state business, while small, was helpful in the maintenance of other one-point and pass-through business." *Id.* The Court then pointed to ton miles traveled through West Virginia as suggesting "substantial activity conducted wihin this State." *Id.* In addition, the Court relied upon demurrage charges which in the

Western Maryland portion of the opinion it classed as local income and asserted that barges are docked at piers in West Virginia for substantial periods through the year. *Id.*

The Court referred, also, to infrequent purchases of food and fuel, the drop off and pick up of employees, and possible repair of boats and barges. Finally, the Court alluded to possible in-state emergency medical attention of barge employees in a West Virginia hospital, the Court adding that "most hospitals receive some State aid." 282 S.E.2d at 253.

Pursuant to the Court's opinion, an order of judgment reversing the Circuit Court of Kanawha County (Appendix E, *infra*) was entered on July 17, 1981.[7]

Subsequently, on August 17, 1981, the Appellant filed a timely petition for rehearing pursuant to Rule 24 of the Rules of Appellate Procedure, West Virginia Supreme Court of Appeals. In that petition the Appellant urged that the Court's decision of July 17, 1981, was erroneous in that it misapplied various principles of constitutional law, assumed facts not in the record, and recited facts which were contrary to the record. By order entered October 8, 1981 (Appendix F, *infra*), the Appellant's petition for rehearing was denied.

Following this denial the Appellant filed and served its Notice of Appeal to the United States Supreme Court on December 9, 1981 (Appendix G, *infra*).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The questions presented in this appeal are substantial for the following reasons:

a) A resolution of this appeal will provide this Court with the opportunity to apply the "substantial nexus"

[7]The issue of travel in the State of Ohio (see footnotes 5 and 6, *ante*) was remanded to the Circuit Court.

principle of *Complete Auto Transitt, Inc.* v. *Brady*, 430 U.S. 274 (1977), to a case where such nexus, as a basis to sustain the imposition of a direct tax upon interstate commerce, is contested;

b) The lower court's holding exceeds the heretofore enunciated nexus standards applicable to state taxation by failing to recognize that the connection required between a state and the entity taxed must be a substantial presence within the taxing state which presence bears a substantial relationship to the benefits, opportunities and protections offered by the taxing state;

c) This appeal presents the ultimate question of whether there are any constitutional limits to state taxation of interstate commerce.

a. A resolution of this appeal will provide this Court with the opportunity to apply the "substantial nexus" principle of *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), to a case where such nexus, as a basis to sustain the imposition of a direct tax upon interstate commerce, is contested.

In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), this Court considered anew the limits of a state's taxing power under the due process and commerce clauses. Under the standards enunciated in *Complete Auto*, a tax would not be sustained against a constitutional attack unless: the activity taxed has a substantial nexus with the taxing state; the tax is fairly apportioned; the tax does not discrimiate against interstate commerce; and the tax is fairly related to services provided by the taxing state. Since the taxpayer in *Complete Auto* had failed to allege that the tax violated any of these requirements, the Court did not amplify upon the four-part test.

Despite this lack of amplification, the Court's decision in *Complete Auto* has become one of the most important in the history of constitutional law regarding state and local taxation. The West Virginia Supreme Court, in the opinion below heralds *Complete Auto* as "the touchstone for all subsequent opinions." 282 S.E.2d at 245; *see also, Chesapeake and Potomac Co. v. State Tax Dep't.*, —— W. Va. ——, 239 S.E.2d 918, 924 (1977). A recitation of this the four-part test has become a standard preamble to all opinions dealing with challenges to taxing statutes on constitutional grounds. See, *e.g., Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425 (1980); *Commonwealth Edison Co. v. Montana*, —— U.S. ——, 69 L.Ed.2d 884 (1981).

As a result, several of the constitutional criteria set forth in *Complete Auto* have been amplified by subsequent decisions of this Court. For example, in *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267 (1978), the court dealt extensively with the issue of proper apportionment under the due process and commerce clauses.

In *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977), decided shortly before *Complete Auto*, the court amplified upon the requirement that a tax must not discriminate against interstate commerce. *See, also Maryland v. Louisiana*, —— U.S. ——, 101 S. Ct. 2114, 68 L.Ed.2d 576 (1981). In *Commonwealth Edison Co. v. Montana*, —— U.S. ——, 69 L.Ed.2d 884 (1981) the Court dealt with the fourth test, that the tax is fairly related to services provided by the taxing state, in a context where nexus was concedely present.

Thus, since *Complete Auto Transit, Inc. v. Brady*, this Court has construed or applied three of the four tests therein set forth. However, the Court has not had

the opportunity to apply the substantial nexus test of *Compete Auto* to tailored direct taxes such as the one at issue here.

It is true that in two post-*Complete Auto* decisions, the Court has considered a nexus question. However, these decisions dealt with limited issues and, thus, did not provide a general framework for dealing with the more common nexus issue presented by direct state taxation of a specific business activity.

The first of these cases, *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977), considered the limited issue of the duty of an out-of-state seller to *collect* use taxes with respect to in-state sales. This court upheld the tax collection duty in question against a nexus attack stating that where a use tax is involved, there need be no connection between the activity sought to be taxed and the taxpayer, so long as there is a connection between the taxpayer and the taxing state.

The Court took pains to distinguish necessary nexus criteria as between the collection of use taxes and direct taxes. With respect to the former, the Court stated that jurisdiction over the *person* was sufficient to impose the use tax collection duty. With respect to the latter, the Court did not curtail or modify the state-activity connection required by *Complete Auto* and preceding decisions. Instead, the Court specifically recognized that the requirement of nexus as to direct taxes means that there must be a connection between the state and the activity which it seeks to tax. 430 U.S. at 560.

The West Virginia Supreme Court failed to recognize and apply this distinction and clearly erred when, after citing *National Geographic* as its authority, asserted "[n]either is it necessary for there to be a nexus between the particular in-state activities of the taxpayer and the activity sought to be taxed." 282 S.E.2d at 244.

This Court next faced a nexus issued in *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425 (1980), a case involving the narrow issue of the proper measure of apportionable income with respect to a corporate income tax. The nexus question presented in *Mobil* was whether there was a sufficient connection between the taxing state and certain foreign dividends for those dividends to be included within the *tax base*. The court resolved this issue by holding that the dividends were subject to tax because they were part of the unitary business of the taxpayer to which a substantial business nexus or presence in the State was evident.

Clearly *Mobil* is unrelated to the important and unresolved question presented here; that being the right of the state to tax certain specific activities where a substantial business presence is contested.

Finally, in its most recent decision regarding the constitutional limits of state taxation, *Commonwealth Edison Co. v. State of Montana*, —— U.S. ——, 69 L.Ed.2d 884 (1981), the Court set the stage for the instant appeal by discussing at length the relationship between the nexus requirement and the state benefits requirement. In *Commonwealth Edison*, the taxpayers challenged a severance tax placed upon coal severed within the taxing state. Substantial nexus was concededly present since the mining was conducted in the taxing state. However, the taxpayers challenged the tax on the basis that it was not fairly related to governmental services upon the theory that the amount of the tax was disproportionate to the value of the benefits bestowed by the state. In rejecting this theory, the Court dismissed any notion that the state benefits requirement is an arithematic one involving a comparison of the tax levied with the benefits conferred. Rather the Court stated:

> The test is closely connected to the first prong of the Complete Auto Transit test. Under this threshold test, the interstate business must have a substantial nexus with the State before *any* tax may be levied on it. Beyond that threshold requirement, the fourth prong of the Complete Auto Transit test imposes the additional limitation that the *measure* of the tax must be reasonably related to the extent of the contact, since it is the activities or presence of the taxpayer in the State that may properly be made to bear a 'just shareof state tax burden.' As the Court explained in Wisconsin v. J. C. Penney Co., supra., at 446 85 L.Ed. 267, 61 S.Ct. 246 (emphasis added), 'the incidence of the tax *as well as its measure* [must be] tied to the earnings which the State . . . has made possible, insofar as government is the prerequisite for the fruits of civilization for which, as Mr. Justice Holmes was fond of saying, we pay taxes.'

69 L.Ed.2d at 899-900 (citations omitted).

A consideration of the *Complete Auto* decision and its progeny raises important nexus issues which are presented in this appeal. The first of these is the presence necessary for a state to tax a particular business activity. The second is whether, given some miniscule presence, the state may impose a tax where there is no substantial connection between the presence of the taxpayer and its activities and the opportunities, protection and benefits conferred by the taxing state.

The first question is raised by the traditional standard that the nexus be substantial. Despite its frequent repetition, the term "substantial nexus" has never been fully defined by the Court. A reading of pre-and post-*Complete Auto* cases demonstrates that the Court, almost invariably, has pointed to fixed and regular connections such as in-state offices, employees and property or the lack thereof as indicative of nexus. The

Court has dealt only sparingly with cases such as this where a physical presence exists but is so transitory that there are no fixed in-state contacts.

The second question is clearly presented by this Court's linkage of the nexus and state benefits requirements in *Commonwealth Edison, supra*. Prior to *Complete Auto* the nexus and state benefits concepts were often linked by the familiar statement that the tax must bear a relationship to the benefits, opportunities and protection conferred by the taxing state. *See, e.g., State of Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, 444 (1940). By reuniting the substantial contacts requirement with the state benefits requirement, *Commonwealth Edison* seems to be saying that the tax must not only be related to a substantial presence but also to a presence which has substance in relation to the benefits, protection and opportunities conferred by the state of taxation.

Clearly, the boundaries of the connection required between the nexus relied upon and the taxing state must be explored in deciding this case, since no matter how one characterizes the Appellant's presence in West Virginia, there is no substantial connection between that presence and the benefits, opportunities and protection conferred by the state.

A final nexus issue is raised by the lower court's application of the "borrowed nexus" analysis of *National Geographic* to a direct tax. As *Complete Auto* stated and as *National Geographic* recognized, historically direct taxes satisfy the nexus test only where the activity taxed has a substantial nexus with the taxing state. By applying a borrowed nexus analysis to the direct tax at issue here, the lower court has called into question the proper application of *National Geographic*.

b. The lower court's holding exceeds nexus standards applicable to state taxation as heretofore

> enunciated by this Court by failing to recognize that the connection required between a state and the entity taxed must be a substantial presence within the taxing state which presence bears a substantial relationship to the benefits, opportunities and protections offered by the taxing state.

The lower court found a sufficient nexus to exist between the state and all of the interstate activities (one-point and pass-through traffic) sought to be taxed. It did so, however, only by an improper application of constitutional principles enunciated by this Court.

The underpinings of the West Virginia Supreme Courts' finding of a sufficient basis to sustain a tax upon Appellant's interstate business rests upon two incorrect legal premises. The first is a misapplication to a direct tax of this Court's borrowed nexus holding as to use taxes in *National Geographic* v. *California Board of Equalization*, 430 U.S. 551 (1977), evidenced by the lower court's threshold assertion that it is not necessary for there to be a nexus connection between the particular in-state activities of the taxpayer and the activities to be taxed. *See*, 282 S.E.2d at 244. The second incorrect legal premise, *contra* to the teachings of *National Bellas Hess* v. *Department of Revenue of the State of Illinois*, 386 U.S. 753 (1967), is that purposive revenue generating activities in the State, of themselves, are sufficient to render a person liable for payment of direct state taxes. *See*, 282 S.E.2d at 244. This last legal premise was characterized by the Circuit Court as the State's "business climate theory" which it viewed as untenable, factually and legally. See, Appendix C, *infra*, at .....

To find a presence sufficient to support "*any*" tax (emphasis in original, 282 S.E.2d at 252), the West Virginia Court pointed to three factual matters: Appel-

lant's two-point business upon which tax was paid, to the existence of West Virginia customers as to its more significant one-point business, and to substantial activity on the Ohio River.

Suffice it at this juncture to observe as to the final two points that customers alone do not supply the necessary in-state presence or nexus to tax interstate commerce, *National Bellas Hess, supra*, and the use of the Ohio River as a highway of commerce is open to all United States citizens. Moreover, the Ohio River, today, from mile post 40 to mile post 317 is not wholly within West Virginia. Fuel, services, medical attention for crew and the like may be obtained equally from the State of Ohio on its western bank as from West Virginia on the eastern bank.

The first point, Appellant's presence, said to arise because of the payment of tax on its two-point business, merits a more complete response. Appellant's two-point business was said to be "at least persuasive that some nexus exists." 282 S.E.2d at 252. It is useful, therefore, for this Court to know the extent of such two-point business.

The court below found that Appellant's two-point business was one-half of one percent (0.005) of all of its traffic (cargo ton-miles) that touches West Virginia and one fifteen-hundredths (1/1500) of all of its traffic everywhere. In terms of gross revenue, Appellant's two-point traffic, beginning and ending in West Virginia, varied from a low of $20,209 in 1969 to a high of $30,612 in 1970, and for the five year period averaged only $26,584. During this period Appellant's total gross income varied from a low of $10,809,000 in 1967 to a high of $16,913,000 in 1971.

Said the Circuit Court (Appendix C, *infra* at 52a).

> "The plaintiff's only connection with West Virginia is through its miniscule 'two-point' or

> intrastate business that utilizes exlusively instruments of interstate commerce (barges and tugs). The plaintiff, unlike the taxpayers in *National Geographic*, has no office or other place of business in the taxing state and has no representative in same. The plaintiff utilizes no docks or other facilities of this State. It does not load or unload barges in this State."

Payment by Appellant of a tax on its two-point service simply followed the law of the State as enunciated in *American Barge Line Co. v. Koontz*, 136 W.Va. 747, 68 S.E.2d 56 (1951), which upheld a predecessor statute as to two-point business, but held that statute unconstitutional as to one-point and pass through business.

In its tortured anyalysis, the lower court ignored prior decisions of this Court articulating a standard of nexus which makes sense from the persepctive of economic principles underlying the commerce clause and principles of fair play underlying the due process clause. This standard derives from interplay of the nexus requirement and the state benefits requirement recognized in *Commonwealth Edison v. State of Montana, supra.*, and finds support in decisions both preceding and following *Complete Auto*.

An examination of these decisions reveals that in order for the requirement of nexus to be satisfied: (i) there must be a substantial presence of the taxpayer and his business activity within the taxing state; and (2) that presence must be such that it bears a substantial relationship to the opportunities, benefits and protection afforded by the taxing state.

The importance of a connection between the state and both the taxpayer and his business activities is demonstrated by a comparison of *National Geographic, supra*, and two earlier decisions involving somewhat similar issues, *Standard Pressed Steel Co. v. State of Washington Department of Revenue*, 419 U.S.

560 (1975) and *National Bellas Hess v. Dept. of Revenue of the State of Illinois*, 386 U.S. 753 (1967).

As noted previously, in *National Geographic*, the Court held that a sufficient nexus existed to support the imposition of a use tax collection duty on an out-of-state mail order seller. This nexus, according to the Court, was supplied by the taxpayer's maintenance of two offices within the taxing state which solicited advertising copy for the taxpayer's magazine, but performed no activities related to the sales in question. In *Standard Pressed Steel, supra*, the Court upheld a tax upon the taxpayer's gross receipts derived from sales to an in-state customer where the only connection with the taxing state, apart from the sales, was an employee of the taxpayer who, from his home, engaged in substantial activities in connection with the sales but took no orders.

While *Standard Pressed Steel* and *National Geographic* appear to apply liberal nexus tests, in neither of these decisions did the Court suggest that business dealings with in-state customers was, in and of itself, sufficient to satisfy the nexus requirement. Instead, each of these decisions rested firmly upon the fixed presence of the taxpayer in the taxing state.

For example, in *National Geographic*, the Court stated:

> Our affirmance of the California Supreme Court is not to be understood as implying agreement with that court's "slightest presence" standard of constitutional nexus. *Appellant's maintenance of two offices in the State* and solicitation by employees assigned to those offices of advertising copy in the range of $1 million annually established a much more substantial presence than the expression "slightest presence" connotes. Our affirmance thus rests upon our conclusion that appellant's maintenance of the two

> offices in California and activities there adequately establish a relationship or "nexus" between the Society and the State that renders constitutional the obligations imposed upon appellant pursuant to §§ 6203 and 6204. This conclusion is supported by several of our decisions. (Emphasis supplied).

Id. at 556.

The same type of analysis was utilized in *Standard Pressed Steel, supra.*, where the Court stated:

> We think the question in the context of the present case verges on the frivolous. For appellant's employee, Martinson, with a full-time job within the State, made possible the realization and continuance of valuable contractual relations between appellant and Boeing.

Id. at 562. According to the Court, the presence of the taxpayer's local employee in *Standard Pressed Steel* brought the case within the ambit of the Court's earlier decision in *General Motors Corporation v. Washington*, 377 U.S. 436 (1964):

> [General Motors] is almost precisely in point so far as the present controversy goes. While the zone manager for sales of the Chevrolet, Pontiac, and Oldsmobile divisions was in Portland, Ore., district managers lived and operated within Washington. Each operated from his home, having no separate office. Each had from 12 to 30 dealers under supervision. He called on each of these dearlers, kept tabs on the sales forces, and advised as to promotional and training plans. He also advised on used car inventory control. He worked out with the dealer estimated needs over a 30-, 60-, and 90-day projection of orders. General Motors also had in Washington service representatives who called on dealers regularly, assisted in any troubles experienced, and checked the adequacy of the service department's inven-

> tory. They conducted service clinics, teaching dealers and employees efficient service techniques. We held that these activities served General Motors as effectively when administered from "homes" as from "offices" and that those services were substantial "with relation to the establishment and maintenance of sales, upon which the tax was measured."

Id. at 563.

Clearly both *National Geographic* and *Standard Pressed Steel*, presented the Court with the opportunity to hold that the occurrence of business transactions within the taxing state is sufficient to satisfy the requirements of the Constitution. However, the Court declined to so hold and instead based its decisions principally on the fixed presence in the taxing state of some of the taxpayer's business operations and employees.

The importance of this fixed presence of the taxpayer is apparent from a comparison of the foregoing decisions with *National Bellas Hess v. Dept. of Revenue of the State of Illinois, supra.* In *National Bellas Hess*, the taxpayer engaged in the sale of goods to Illinois residents, but had no place of business in Illinois; no Illinois agents who solicited orders, and no property located in Illinois. The question presented was whether the State of Illinois could constitutionally require the taxpayer to collect and pay use taxes on its sales to Illinois customers. The Supreme Court held it could not, finding the taxpayer's connections with the State to be too tenuous to support the tax.

Insofar as the business activity involved was concerned, *National Bellas Hess* involved the same nexus question as *National Geographic* and *Standard Pressed Steel*, the taxation of in-state sales by an out-of-state seller. The only factor distinguishing the former from the latter two, and the factor which therefore

must be considered determinative for purposes of nexus analysis, is that in *National Geographic* and *Standard Pressed Steel* the taxpayers had a fixed presence, office or employees, in the taxing state.

This presence requirement is one related to both the commerce clause and the due process clause. Clearly, requiring such a connection diminishes the risk of double taxation in violation of commerce clause principles. Furthermore requiring such a presence serves the jurisdictional and fair play principles underlying the due process clause.

However, it is clear that presence alone, does not supply the entire nexus test. In order for that presence to have significance as far as the issue of taxation is concerned it must be a presence which bears a relationship to the opportunities, benefits and protections conferred by the state imposing the tax.

This additional requirement has received little practical application since once there is an established presence of the taxpayer and his business activities within the taxing state, there is normally little doubt that he is enjoying the benefits and services of the state for which all taxpayers pay. Nonetheless, before the splitting of the nexus and state benefits requirements in *Complete Auto* and their reunion in *Commonwealth Edison*, nearly every Supreme Court decision regarding nexus paid homage to the doctrine that the required nexus was present where,"by the practical operation of [the] tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred . . . ." *Northwestern State Portland Cement Co.* v. *State of Minnesota*, 358 U.S. 450, 465 (1959) quoting *Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, 444 (1940). Thus, where the state provides no substantial benefits, opportunities or protections it has "no legitimate claim to impose 'a fair' share of the cost of

local government." *National Bellas Hess* v. *Department of Revenue of the State of Illinois, supra* at 760.

It is within this context that this case must be analyzed. And it is within this context that this case presents the Court with a unique opportunity to amplify upon the presence and state benefits aspects of the constitutional test. For this appeal, unlike the decisions discussed above, presents a situation where the taxpayer and its activities have, at best, only a negligible transitory presence within the taxing state and the benefits, opportunities and protection provided by the taxing state bear little or no relationship to that presence.

While the lower court suggests a number of real and supposed incidental contacts probative of such a presence or benefit, (e.g., infrequent purchases of food and fuel from West Virginia vendors in route), the only issue of substance is whether the use of federally controlled and maintained waters within a state, without more, is a presence sufficient to justify the imposition of a tax upon that use.

While the Appellant's barges and tows are physically within the boundaries of the State for limited periods of time, such is the limit of the Appellant's contact with the State. Despite the fact that West Virginia owns the land underlying the river, the mode through which the travel occurs, flowing water is not owned or regulated by the State. Instead, the navigable waters are the public property of the nation. *United States* v. *Rands*, 389 U.S. 121 (1967). Since the Ordinance for Government of the Northwest Territory in 1789, and the Virginia Compact in 1789, it has been declared that the use and navigation of the Ohio River shall be free and common to the citizens of the United States, 1 Stat. at L.50 and 189.

Furthermore, by virtue of the commerce clause the Congress has the power to regulate navigable streams to the exclusion of states, *United States* v. *Rands, supra; City of Tacoma* v *Taxpayers of Tacoma*, 357 U.S. 320 (1958), a power which Congress has exercised with respect to almost every aspect of river use.[8]

Thus, it is apparent from both applicable law and the record below that there is no connection between the waters utilized by the Appellant and the State of West

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[8]See e.g., 33 U.S.C. §1 ("[i]t shall be the duty of the Secretary of the Army to prescribe such regulations for the use, administration, and navigation of the navigable waters of the United States . . ."); Rivers and Harbors Act of 1899, 33 U.S.C. 401 *et. seq.*; 33 C.F.R. §60-76 (providing for navigation aids); 33 U.S.C. §151 *et. seq.* and 33 C.F.R. §207 (navigation rules and regulations); 33 U.S.C. §471 (Secretary of Transportation empowered to establish anchorage grounds in all rivers of the United States); 33 U.S.C. §491 (plans for bridge construction subject to approval by the Army Corps of Engineers); 33 U.S.C. §540 (relating to river improvements by the Army Corps of Engineers.)

Appellant operates under the authority of the Interstate Commerce Commission in conjunction with the Waterways Freight Bureau on the basis of published tariffs which include all terms and conditions, bills of lading, rates and all matters attendant to transportation. The Corps of Engineers of the U.S. Army constructs, maintains, and supervises the use of all navigation facilities. Locking procedures and other water facilities on the Ohio and Kanawha Rivers are also extensively regulated by the Army Corps of Engineers. The Army Corps of Engineers licenses and regulates all pipelines and transmission lines which intercept navigable waters.

The United States Coast Guard makes itself responsible for orderly and safe transportation through navigable waterways. *See, e.g.*, House Report No. 1878, May 7, 1948. Accidents occuring on navigable rivers must be reported to the Coast Guard. 33 U.S.C. §361. Dry markers, buoy markers and lights as well as other navigation aids are placed and maintained by the Coast Guard along shores and bridges, etc. The Coast Guard requires written reports on all casualty losses having a dollar figure which exceeds $2,500 or repairs or groundings or strandings or personal injuries which might result in a three-day delay of the effected operation. Equipment which is employed in Plaintiff's operations must meet specifications set out in Coast Guard regulations as well as Federal statutory provisions; things such as firefighting equipment and minimum lighting. Other Federal agencies such as the United States Public Health Service and the Federal Communications Commission also prescribe equipment standards to promote assurances of safe barge traffic to all parties and properties involved. The United States Coast Guard licenses all master pilots, pilots and engineers to diminish the possibility of ensnarling accidents and delays.

Crew members are not covered by State Workmen's Compensation laws and any suits brought by them are done pursuant to the Jones Act, 46 U.S.C. §688, *et seq.*

Virginia except the claim of ownership of the river beds. West Virginia neither regulates the Appellant nor its operations nor provides any of the considerable navigational benefits available to the Appellant through the various agencies of the federal government. The only contact between the Appellant and the State is the use of navigable streams located within the State. The only contacts with in-state businesses are incident to that use; such as the pick up and drop off of barges and occasional purchases of food and fuel.

Thus, there is presented by this appeal a substantial question of whether the substantial presence and benefit aspects of the nexus test are satisfied by the tax at issue.

The only aspect of the Appellant's West Virginia operations in dispute which is even remotely probative of nexus is the fact that Appellant's barges are dropped off at customer docks for loading or unloading by the customer, facts which the West Virginia Court had previously characterized in 1951 as insufficient to support the tax. As to this aspect of the Appellant's activities, the court on this occasion reversed its prior holding in *American Barge Line, supra,* and found that the docking of the barges in question provided a sufficient nexus for the entire scheme of state taxation based upon this Court's 1949 decision in *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, where the Court upheld a property tax placed upon barges loading and unloading in the State of Louisiana and based upon a ton-mile formula.

With respect to the lower court's analysis, it must be noted that, since *Ott* did not involve pass-through traffic, it at best stands for the proposition that a sufficient nexus for tax purposes exists between the taxpayer and West Virginia with respect to one-point operations.

Even at that, however, an application of the theory espoused in *Ott* ignores past decisions of this Court regarding the nexus required for the taxation of business activities. Unquestionably, property has a taxable situs and in *Ott* the Court did nothing more than find that situs was in the confines of the state imposing the tax.[9] However, as demonstrated in *National Bellas Hess*, the mere existence of business activities within a state has not historically been sufficient to supply a nexus for taxation of those activities absent some fixed presence relating the taxpayer, the activity being taxed, and the state. Further, is has long been recognized as to river travel, that "[t]o land where the navigator pleases to land, to put off his produce or goods on any convenient grounds" is a right and not a benefit received from the state. *Ravenswood v. Fleming*, 22 W. Va. 52 (1883).

A tailored tax such as the one at issue imposed upon interstate commerce must receive careful scrutiny because of the potential lack of relationship to the services provided by the state. *Complete Auto Transit Inc. v. Brady*, 430 U.S. at 288, fn. 15. This lack of relationship has been demonstrated.

No matter how one views the Appellant's "presence" in West Virginia, there is little, if any, relationship between that presence and the income it generates and state benefits insofar as the tax in question is concerned. The service performed is the transportation of freight on the navigable waterways. As the record amply demonstrates, all improvements, maintenance and navigational aids in and along the West Virginia waters traveled by the Appellant have been and are supplied by the federal government. Furthermore, the

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[9]Indeed, the Court has long recognized that instrumentabilities of interstate commerce are subject to property taxation under proper apportionment formulae. See Hartman, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION, §7.8-7.11 (1981).

statutes and regulations under which the Appellant operates are federal in nature.

To find any benefit, opportunity or protection conferred upon the Appellant by the state, one has to adopt the conjectural approach employed by the lower court and allude to benefits available from such things as: an inspection or repair crew being sent to West Virginia because of a damaged barge; an ill crewman being taken to a West Virginia hospital; infrequent purchases of food or fuel from West Virginia vendors; and the use of West Virginia as an occasional pick-up or drop-off point for its employees.

Clearly, these are not benefits which bear any "practical relation" to the tax imposed. They are nothing but infrequent and inconsequential incidents of river travel. Furthermore, when it is considered that the overwhelming majority of the Appellant's travel occurs on the Ohio River, it cannot be said that these benefits relate to "'that aspect of interstate commerce to which [West Virginia] bears a special relationship,'" *Commonwealth Edison v. Montana, supra,* at 899, quoting *General Motors Corp. v. Washington*, 377 U.S. 436, 441 (1964), since each of them could as easily be supplied by the State of Ohio.

From the above, it is apparent that Appellant has no substantial presence in the State and that there is no practical relationship between the tax imposed and the opportunities, benefits and protection conferred by the state.

c. This appeal presents the ultimate question of whether there are any constitutional limits to state taxation.

The West Virginia Supreme Court asserts that purposive, revenue generating activities in the State are sufficient to render a person liable for taxes. *See* 282 S.E.2d 244.

At the heart of this appeal is an issue which supercedes the recitation and application of judicial principles engaged in above. Time and again, taxpayers relying upon past decisions of this and other courts have attempted to overturn taxes upon constitutional grounds only to be turned back by the swelling tide of decisions expanding the taxing power of the states. This appeal presents an opportunity to stem that tide and to provide needed perspective and balance. For if the lower court's decision bottomed in material part upon a business climate theory is not considered and reversed, there is virtually no limit to the taxing powers of the state.

Utilizing the lower court's analysis, sweeping taxes can be imposed upon activities having only the slightest presence in the taxing state merely because there are substantial customers within the State. And a state may impose a tax despite the fact that there is absolutely no reason grounded in fairness for the taxpayer to bear a portion of the cost of local government.

Finally, a state may place a tax upon the use of a federal avenue of commerce merely because that avenue is located within the boundaries of the state. This latter aspect of the Court's decision suggests an application to airline carriers. An airplane overflying West Virginia's surface is logically indistinguishable from a barge traversing her riverbeds. Like the barge, the plane may be forced to land in West Virginia. Like the barge, the plane may have a sick crew member who obtains medical attention at a West Virginia hospital. Like the barge company, the airline may have customers in West Virginia.

Clearly, the State has gone too far. However, the only method for remedying its excesses and clarifying the

constitutional nexus principles is by giving full consideration to this appeal and reversing the decision below.

CONSLUSION

For the reasons stated above, it is respectfully requested that the Court note probable jurisdiction of this appeal.

Respectfully submitted,

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Appendix

APPENDIX A

No. 14636

WESTERN MARYLAND RAILWAY CO.

v.

THOMAS R. GOODWIN, TAX COMMR., ETC.

No. 14473

W.VA. MOTOR DELIVERY CO., INC.

v.

THOMAS R. GOODWIN, TAX COMMR., ETC.

and

No. 14870

UNION BARGE LINE CORP.

v.

DAVID C. HARDESTY, JR., TAX COMMR., ETC.

Kanawha County — Reversed and remanded.

Filed July 17, 1981
George W. Singleton,
Clerk of the Supreme Court
of Appeals of West Virginia

Neely, Justice

1. A state tax on interstate commerce will not be sustained unless it: "(1) has a substantial nexus with the State; (2) is fairly apportioned; (3) does not discriminate; and (4) is fairly related to the services provided by the State." *Maryland v. Louisiana*, —— U.S. ——, —— (1981).

2. *W. Va. Code*, 11-12A-2 [1967, 1971] taxes the income of carriers derived from business which begins and ends in West Virginia, regardless of whether the business may also be related to interstate commerce in a tangential way.

3. It is not improper to rely on post-1976 precedent to assess taxes for 1967-73.

4. Income earned by a railroad for switching operations and from demurrage tariffs, when both of these activities take place entirely within West Virginia, is properly taxed under *W. Va. Code*, 11-12A-2 [1967, 1971].

5. The discretion given the State Tax Commissioner by *W. Va. Code*, 11-12A-6 [1967] to consider federal net income figures for tax purposes does not give the commissioner the right to confer the substantive benefit of allowing carriers to carry losses forwards and backwards from one year to others. However, when the commissioner requests federal tax figures from taxpayers and then assesses their taxes on some other basis not otherwise indicated to the taxpayers, he may not assess a penalty in addition to the revised assessment.

.6. Income derived by a trucking company for deliveries made between its West Virginia warehouse and points within West Virginia is taxable under *W. Va. Code*, 11-12A-2 [1967, 1971].

7. A ruling by the tax commissioner, not appealed within thirty days, is final only with regard to the particular tax, taxpayer, and years covered by the ruling under *W. Va. Code*, 11-12A-8(c) [1962].

8. A foreign barge company which tows barges to and from West Virginia, as well as through it and between points within it, may be taxed under *W. Va. Code*, 11-12A-3 [1967]. To the extent that this is inconsistent with *American Barge Line Co. v. Koontz*, 136 W. Va. 747, 68 S.E.2d 56 (1951), that decision is overruled.

Neely, Justice:

These three tax cases involve the well cultivated field of the constitutional and statutory limitations on the power of the State to tax interstate commerce. The cases were briefed and argued separately before us, but we consolidated them to treat in one opinion the common issues raised. Of course, ultimately the determination of each turns on its facts, so to that extent they will be considered separately.

The cases involve the application of the State's Tax on the Income of Certain Carriers, *W. Va. Code*, 11-12A-1, *et. seq.*, [1967, 1971], particularly sections 2 and 3. *Code*, 11-12A-2 [1967, 1971] taxes a host of carriers of people and/or property for their business "beginning and ending" in this State.[1] The tax is levied on the

[1]*W. Va. Code*, 11-12-2 [1971], substantially the same as *Code*, 11-12A-2 [1967], provides:

Every motor vehicle carrier operating on the public highways of this State and every railroad car carrier, railroad carrier, express company, pipeline company, telephone and telegraph company, airline company and any person operating a steamboat or other watercraft, for the transportation of passengers or freight, doing business in the State shall pay to the State an annual tax for each calendar year. This tax shall be equal to the gross income from all business beginning and ending within the State multiplied by the respective rates as follows: Motor vehicle carriers, railroad car carrier, railroad carrier, express companies, pipeline companies, airline companies, any person operating a steamboat or other watercraft and telegraph companies, three and three-tenths percent, and telephone companies, three

(Footnote continued on page 4a)

gross income generated by such business. *Code*, 11-12A-3 [1967, 1971] taxes the same carriers, in addition to the tax in section 2, (giving a credit for the taxes paid under section 2) for the portion of their interstate transportation business which takes place in this State.[2] This tax on interstate business is levied on a

and seventy-four one hundredths percent: Provided, that any motor vehicle carrier which is an urban or suburban bus line shall be taxed at the rate of one and sixty-five one hundredths percent of such gross income and any motor vehicle carrier which is a taxi or cab company or a company which hauls waste, refuse or garbage shall be taxed at the rate of two and five-tenths percent of such gross income.

[2]The relevant portions of *Code*, 11-12A-3 [1971], essentially the same as *Code*, 11-12A-3 [1967], are:

In addition to the tax imposed in the preceding section [§ 11-12A-2], every motor vehicle carrier operating on the public highways of the State and every railroad carrier, railroad car carrier, express company, pipeline company, telephone and telegraph company, airline company and any person operating a steamboat or other watercraft for the transportation of passengers or freight, doing business in this State shall pay an annual tax for each calendar year on the net income earned within the State equal to three and seventy-four one hundredths percent of such net income for all other carriers included in this section: Provided, that any motor vehicle carrier which is an urban or suburban bus line or a taxi or cab company or a company which hauls waste, refuse or garbage, five percent of such net income. Net income shall be determined as follows:

(a) The net income of motor vehicle carriers earned within the State shall be determined by ascertaining a sum bearing the proportion to the total net income of the motor vehicle carrier that its business done in West Virginia measured in motor vehicle carrier operation, bears to all business done, measured in like fashion;

(b) The net income of railroad carriers earned within the State shall be determined by ascertaining a sum bearing the proportion to total net income of the carriers that its business done in West Virginia, measured in ton-miles, bears to all business done, measured in like fashion;

* * * *

(e) The net income of airline companies and any person operating a steamboat or other watercraft for the transportation of passengers or freight earned within the State shall be determined by ascertaining a sum bearing the proportion to the total net income of the corporation that its business done in West Virginia, measured in passenger-miles in the case of airline companies, and ton-miles in the case of any person operating a steamboat or other watercraft, bears to all business done, measured in like fashion;

* * * *

(g) In computing the tax imposed by this section, the total net income of a taxpayer who shall have been taxed under the preceding section [§ 11-12A-2], shall be reduced by an amount bearing the proportion to such total net income that the gross income of the taxpayer which is the measure of the tax under the preceding section bears to its total gross income from all business done wherever conducted.

carrier's net income by multiplying that income by a fraction, the numerator of which is West Virginia cargo miles and the denominator of which is total cargo miles in the carrier's system.

None of the taxpayers in these cases challenges the State's power to tax interstate commerce in the abstract, but they do challenge the legitimacy of one or the other of these taxes as applied to particular aspects of their activities, either on statutory or constitutional grounds.

The states's taxing powers with regard to interstate commerce are limited by the Due Process and Commerce Clauses of the *U. S. Const.*, amend. XIV and Art. 1, Sec. 8, cl.3. Together, these provisions require that the incidence and particular applications of state taxes meet a four-part test. A tax will not be sustained unless the tax: "(1) has a substantial nexus with the State; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and, (4) is fairly related to the services provided by the State." *Maryland v. Louisiana*, —— U.S. ——, (1981). This test is referred to in *Maryland* as the *Complete Auto* test, after the ruling in *Complete Auto, Inc. v. Brady*, 430 U.S. 274, (1977), and it will be referred to as such in the course of this opinion. Subsequent Supreme Court rulings allow us to expand briefly on the contemporary requirements of the *Complete Auto* test.

1. Nexus

The U.S. Supreme Court as often as not has spoken about what is **not** sufficient in a particular case to meet the nexus requirement. The determination of the issue is fact-bound. However, some observations can be made generally. It seems that the nexus criterion inevitably runs into the fourth criterion, the relation to

services provided by the State. *See Commonwealth Edison Co. v. Montana*, —— U.S. —— (1981). In *National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551, 557, (1977), the Court stated that: "It is particularly significant . . . that the Court [in *Standard Pressed Steel Co. v. Washington Rev. Dep't*, 419 U.S. 560 (1975)] characterized as 'frivolous' the argument that the seller's in-state activities were so thin and inconsequential that the tax had no reasonable relation to the protection and benefits conferred by the taxing State." It is clear that, when a direct relationship can be demonstrated between the tax and the cost to the State of the benefits and protections it affords, there is a sufficient nexus for taxation, *see id.* at 558, but the opposite is not true, i.e., nexus may exist even if the instate activites are not shown to cost the State as much as the amount of the taxes. Neither is it necessary for there to be a nexus between the particular in-state activities of the taxpayer and the activity sought to be taxed. *Id.* We conclude that purposive, revenue generating activities in the State are sufficient to render a person liable for taxes, *See International Shoe Co. v. Washington*, 326 U.S. (1945).

2. Fair Apportionment

This requires little explanation. A tax on a person involved in both wholly intrastate commerce and interstate commerce with in-state aspects, must be tailored so as to attach primarily to revenue derived from in-state activities. In the case of transportation, it is true most of the time that a tax related to cargo or passenger miles traveled in state or to the miles of the line in state will be valid, *see Norfolk & W. Ry. v. North Carolina*, 297 U.S. 682, 684 (1936); *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949).

3. Discrimination

Essentially this criterion requires equal treatment of interstate and local commerce, *see Maryland v. Louisiana*, — *U.S.* —, —*(1981)*. [No state may " 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business," '] *id.*, quoting *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959). *See, too, Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977).

4. Relation To Services

The very recent decision in *Commonwealth Edison Co. v. Montana*, —— U.S. —— (1981) is rather instructive on this issue. *Commonwealth Edison* makes it clear that there need not be any direct correlation between the value of benefits afforded the taxpayer by the State and the cost of the tax to the taxpayer. Once the nexus requirement has been met, the fourth criterion "imposes the additional limitation that the *measure* of the tax must be reasonably related to the extent of the contact, . . the activities or presence of the taxpayer in the State." *Id.* at ——. Therefore, "when the measure of a tax is reasonably related to the taxpayer's activities or presence in the State . . . the taxpayer will realize, in proper proportion to the taxes it pays, '[t]he only benefit to which it is constitutionally entitled . . . [:] that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes.' *Carmichael v. Southern Coal & Coke Co.*, 301 U.S., at 522," *id.* at ——.

The actual holding in *Complete Auto, supra*, was simply that a privilege tax on interstate commerce is

not *per se* unconstitutional. However, the case was heralded at the time as a clarification of the previously murky waters which were the bane of any court's trying to interpret the law of taxation of interstate commerce, *see, e.g., Chesapeake and Potomac Co. v. State Tax Dep't,* —— W.Va. ——, 239 S.E.2d 918 (1977). Time and subsequent Supreme Court opinions have proven that that expectation was not unfounded, for *Complete Auto* was the touchstone for all subsequent opinions. However, it is necessary to sample briefly some of the U.S. Supreme Court's earlier rulings to see the constraints which were deemed to bind our rulings before *Complete Auto.*

In a case which originated in this State, the Supreme Court held unconstitutional a State tax that in effect directly taxed purely interstate commerce, for such a tax would have been a burden on interstate commerce, *Eureka Pipe Line Co. v. Hallanan,* 257 U.S. 265 (1921). Such a prohibition on burdensome direct taxation of gross income from interstate commerce was reaffirmed in, among others, *Freeman v. Hewitt,* 329 U.S. 249 (1946), but that decision also admitted that the states could measure a variety of taxes against the net income of persons doing business or owning property in the State, including income from interstate commerce. However, in *Spector Motor Service v. O'Connor,* 340 U.S. 602 (1951), the Court ruled that any state tax on the privilege of conducting interstate commerce in a state was *per se* unconstitutional. That this was a matter only of semantics and legislative craftsmanship became embarrasingly apparent by the time *Spector* was overruled by *Complete Auto.* Just three years before *Spector* the Court had held that a "franchise or excise" tax levied against the value of the capital assets of a pipeline company involved in interstate

transmission was valid, *Memphis Gas Co. v. Stone*, 335 U.S. 80 (1948). In *Railway Express Agency v. Virginia*, 347 U.S. 359 (1954), the Court held that Virginia's "annual license tax" levied against the privilege of doing business in the state and imposed on gross receipts was unconstitutional. But a similar tax on gross receipts enacted to replace the unconstitutional one, and labeled a "franchise tax," was upheld by the Court in *Railway Express Agency v. Virginia*, 358 U.S. 434 (1959). Other examples might be cited, but these should suffice to show the uncertain perimeters of permissible taxation before *Complete Auto, supra, see* 430 U.S. at 279-85.

The relevant decisions of this Court concerning taxation of interstate carriers followed the Supreme Court's decisions. In *American Barge Line Co. v. Koontz*, 136 W.Va. 747, 68 S.E.2d 56 (1951), we held that the predecessor to *Code*, 11-12A-2 [1967], which imposed a "privilege tax" on "business beginning and ending entirely within the State" as well as on an apportioned share of total gross income from all activities, was invalid as to the latter portion in that it was a direct and unreasonable burden on interstate commerce. The State could tax the barge lines for delivering goods between two points within West Virginia but not for delivering goods whose origin or destination were out of state. In *Battle v. Baltimore & Ohio R.R.*, 149 W.Va. 810, 143 S.E.2d 331 (1965), we held that the application of the privilege tax on apportioned gross income of the B. & O. Railroad was invalid as an unconstitutional burden on interstate commerce. (For a recent discussion of *Battle see Chesapeake and Potomac, supra.)*

It is clear that our cases were conforming to Supreme Court decisions in holding that excessive taxa-

tion of interstate commerce in some instances is an unconstitutional burden and that a privilege tax on carriers could not extend to income derived from interstate commerce. Appellees direct our attention to these cases because they maintain that the words "business beginning and ending" mean purely intrastate commerce, *see American Barge Line Co. v. Koontz*, 136 W.Va. 747, 68 S.E.2d at 61, 63, 64 (1951); *Battle v. Baltimore & Ohio R.R.*, 149 W.Va. 810, 143 S.E.2d at 337 (1965). But in both *American Barge* and *Battle* this distinction was dictum. Also, the tax they were construing was a "privilege tax" and as we noted earlier, it was thought at the time that a tax on the privilege of engaging in interstate commerce was *per se* unconstitutional. A tax on the income of a company involved in interstate commerce, which is the tax before us, was not then and is not now *per se* unconstitutional. For the purposes of determining the range of the tax in *Code*, 11-12A-2 [1967, 1971], we find it far simpler and far more reasonable to apply the plain meaning of the words "beginning and ending" rather than to make nice distinctions between "intrastate" and "interstate" income. For in taxation, absent ambiguity or uncertainty, we will apply the statute and not construe it, *West Virginia Tractor Co. v. Hardesty*, ——W.Va.——, ——S.E.2d—— (1981); *J. D. Moore, Inc. v. Hardesty*, 147 W.Va. 611, 129 S.E.2d 722, 724 (1963).

The last issue we must address before we turn to the specifics of each case is whether we can rely on post-1976 precedent to assess taxes for tax years 1967-73. At least one appellee argues that this is an unfair, retroactive imposition of new law. Succinctly stated, the argument is that if we had ruled on these cases in the years in which the taxes had become due, we would have ruled differently because *Complete Auto* had not

yet been decided. To this there is a succinct answer. We are not convinced that we would have had to rule differently in earlier years. Whether we would have ruled differently is a matter of speculation only. Also, *Complete Auto* explicitly overruled prior case law, yet the taxes there were levied retroactively. Thus we find little problem with holding taxpayers liable for taxes owed between 1967 and 1973.

WESTERN MARYLAND RAILWAY CO.
(McHugh, J., did not participate in the decision of this case.)

Western Maryland Railway, appellee here, is a freight hauling railroad carrier incorporated outside this State and it is qualified to do business in West Virginia. An assessment was made against Western Maryland in 1975 for Carrier Income Taxes for the years 1970-73, and this assessment was affirmed by the Tax Commissioner, less penalty, in 1977. Western Maryland appealed this decision to the Circuit Court of Kanawha County and the Commissioner's assessment was overruled. The State Tax Commissioner appeals that decision to this Court.

Among its other activities, Western Maryland is engaged in switching railcars between connecting line haul tracks and between line haul track and local spurs. It receives separate payments for this switching. It is also payed a separate tariff for undue detention of its cars by customers in loading and unloading, and this tariff is known as demurrage. Western Maryland classified the revenue from switching and demurrage as "intrastate" or "interstate" depending upon the prior and subsequent line haul portion of the cars' movement. If the prior movement originated outside of West Virginia or if the subsequent destination was a

point outside of the State, the revenue was labeled "interstate." Only when the origin and destination of the car were both within West Virginia did the railway classify the income generated as "intrastate." The switching and demurrage Western Maryland called interstate is regulated by the Interstate Commerce Commission while the West Virginia Public Service Commission has jurisdiction over the switching and demurrage appellee called intrastate.

During the years covered by the audit the appellee reported its income from what it designated interstate switching and demurrage under *Code*, 11-12A-3 [1967, 1971] for Carrier Income Tax purposes. The tax commissioner determined that all income from switching services performed and detention of cars wholly within West Virginia should be reported and taxed under the provisions of *Code*, 11-12A-2 [1967, 1971], regardless of appellee's characterization as intra- or interstate. A portion of the 1977 assessment against appellee was due to this reclassification.

Western Maryland also computed its net transportation income for 1971 in accordance with federal income tax methods. This resulted in a net operating loss for that year. Consonant with federal tax practices, it then carried portions of that loss back to 1970 and forward to 1972 and 1973, the result being that Western Maryland showed no West Virginia net income for any of those years. After the audit, the tax commissioner determined that these loss carry-backs and carry-forwards are inappropriate in computing West Virginia net carrier income and he reassessed appellee's tax after disallowing the loss distributions.

A.

The tax commissioner contends here that the activity of switching cars and the activity of detaining cars both begin and end wholly within West Virginia and so should be taxed under *Code*, 11-12A-2 [1967, 1971]. Western Maryland counters by saying that these activities are inextricably connected with a necessary incident of interstate commerce, and so are taxable only under *Code*, 11-12A-3 [1967, 1971]. In effect their argument is that switching and demurrage are part and parcel of the movement of the cars across state lines, notwithstanding the fact that the physical acts of switching and detention occur within the State.

We find little merit to the argument that demurrage is not taxable under *Code*, 11-12A-2 [1967, 1971]. It can as easily be said that demurrage is incidental to the loading and unloading of cargo in this State as that it is an incident of the interstate transportation of that cargo. There is no question in our minds that payments for undue detention of cars within this State provide revenues from "business beginning and ending" in West Virginia. Therefore, demurrage income from detention of cars within West Virginia, whatever the origin or destination of the cars, is taxable under *Code*, 11-12A-2 [1967, 1971].

Switching is a closer question in that it at times involves switching cars that have come from one state onto lines that will take the cars to another state. In this respect, switching might be seen as a part of the flow from one state through West Virginia on to another state. However, our reading of the record satisfies us that switching is a separate, distinct, time-consuming operation and not incidental to the interstate movement of goods. So long as switching is a

distinct and identifiable activity we hold that switching is a business which begins and ends in West Virgina and appellee is liable for taxes on switching revenue under *Code*, 11-12A-2 [1967, 1971].

Having determined that appellee's activities are taxable under the statute we must determine whether such a tax is constitutionally valid. Since the tax is on revenues derived from in-state activities, there is no question that both the nexus and apportionment requirements are met. Furthermore, the tax does not discriminate against interstate commerce: local and interstate commerce must pay the tax alike. Appellee benefits from the State's police and fire protection while engaged in switching cars and appellee is free to use the State's laws and courts to enforce its rights against West Virginia customers and others found in the State. We find, therefore, that the tax is fairly related to the services provided by the State to Western Maryland. Finally, we note that since these activities of appellee take place wholly within West Virginia and they are identified by it as such, there is no chance that the State's imposition of this tax will lead to multiple taxation by another state of the same revenue source and thereby impose an unconstitutional burden on interstate commerce.

Appellee makes a separate constitutional argument that is based on the 1980 amendment to *Code*, 11-12A-2. The amendment exempts motor vehicle carriers from the tax under 11-12A-2 when the activity is "part of an uninterrupted continuation of interstate transportation . . . [and] without a container change or warehousing." Appellee argues first that this amendment evidences a legislative determination that our understanding of the pre-1980 statute is incorrect. Second, it argues that such exemption for motor vehicle carriers

only, and not rail, water and other carriers, violates the Equal Protection Clause, *U.S. Const.*, amend. XIV, the "equal and uniform" taxation clause, *W. Va. Const.*, Article X, Sec. 1, and 49 U.S.C. 11503(b) (1979 sup.) which prohibits taxes which discriminate against railroads. From this it concludes that we should not apply the statute as we have proposed.

If the 1980 amendment shows anything about prior legislative intent, we will adhere to the rule that an amendment is meant to change the law, *see West Virginia Bd. of Dental Examiners v. Storch*, 146 W. Va. 662, 122 S.E.2d 295, 300 (1961); *Kisner v. Fiori*, 151 W. Va. 850, 157 S.E.2d 238, 242 (1967). Therefore, we find that the amendment bears out our understanding that, absent legislated exemptions, *Code*, 11-12A-2 [1967, 1971] taxes all carrier business beginning and ending in the State. If the 1980 amendments violate the constitutional or statutory provisions above, then we should declare that the amendment, not the law it amends, is void. Even if we were to do that, appellee would still be liable for the tax under section 2. That question is not before us, however, and we need not decide it now. Appellee's taxes are being assessed under the pre-1980 statute and the question of whether the 1980 amendment discriminates in any way is not involved at all.

B.

The entire West Virginia tax code is hardly drafted with the precision of the federal *Internal Revenue Code of 1954*. Consequently, there are occasional inartful uses of language which cause trouble for the Commissioner, the taxpayer, and the courts. Such is the reference to the use of federal income tax computations at issue in this case. Certainly it is convenient for a taxpayer to be able to use its federal computations

for State purposes; such a simplification is highly laudable. However, in the case before us, the real issue is one of substantive law and not mere accounting: Is there authority in *Code*, 11-12A-3 [1971] for losses in one year to be carried either forward or backward? We find no authority to this effect, and tax-loss-carry-forward is a crucial, substantive, issue in tax law. There is no problem using the federal figures; it is only the effect of the forms which is at issue. Our statute imposes a yearly tax on each year's income; the statute gives no credit for prior or further losses. This is in sharp contrast to the explicit authority in I.R.C. § 172 (1976). If the Legislature had intended such a credit they would have given it directly, and it is unreasonable to infer from the general authority allowed in *Code*, 11-12A-6 [1967] to use federal forms for accounting purposes that a substantive benefit of considerable magnitude was intended to be conferred in direct controvention of the plain words of *Code*, 11-12A-3 [1967].

The discretion granted the commissioner by *Code*,11-12A-6 [1967] to consider federal net income is for his and taxpayers' convenience. His exercise of that discretion by asking taxpayers for their federal net income confers the benefits of convenience, not the benefits of a tax credit. However, we hold that when the commissioner asks for federal income figures and then assesses the tax at a higher level based on other figures not requested, or at a rate not otherwise indicated, he may not assess a penalty in addition to the revised assessment. Hence the commissioner was correct in waiving the penalty in this case, especially with respect to the additional assessment based on his disallowing the loss distributions.

C.

We conclude, therefore, that the decision of the Circuit Court of Kanawha County should be reversed and the case should be remanded for further proceedings consistent with this opinion.

WEST VIRGINIA MOTOR DELIVERY CO., INC.

The State Tax Commissioner in 1977 affirmed an additional assessment against West Virginia Motor Delivery under *Code*,11-12A-2 [1967, 1971], less penalty as assessed by his office in 1975 for tax years 1970-73. West Virginia Motor Delivery, appellee here, appealed that decision to the Circuit Court of Kanawha County. That court ruled that appellee would be liable for the tax in question under current doctrine, but the court refused to apply its decision retroactively. The State Tax Commissioner appeals from that ruling and we reverse.

West Virginia Motor Delivery is engaged in the business of delivering meat by refrigerated truck. In the years in question, it received shipments of meat at its warehouse near Dunbar, West Virginia, from meat packers, all of whom were located out-of-state. In general, the meat was transferred directly from the shippers' trucks to appellee's trucks, but at times appellee stored the meat in its warehouse overnight. Appellee then delivered the meat to retailers both inside and outside West Virginia. It has been estimated that approximately 88% of appellee's income came from deliveries made to places in West Virginia and 12% from deliveries out-of-state.

Appellee believed that its operations were part of the continuous interstate shipment of goods and so it paid taxes under *Code*, 11-12A-3 [1967, 1971] only. In part

appellee's conclusion in this regard was based on a decision of the State Tax Commissioner in 1964 that appellee was not liable for taxes on such deliveries under *Code*, 11-12A-4 [1962], predecessor to *Code*, 11-12A-2 [1967]. The Tax Commissioner now argues that part of appellee's business involves the delivery of goods wholly within state, and that appellee is therefore liable for tax on income from in-state deliveries under *Code*, 11-12A-2 [1967, 1971] as well as under *Code*, 11-12A-3 [1967, 1971]. As noted above, the circuit court agreed that, under *Complete Auto*, appellee could be so assessed, but the court determined that such assessment amounted to retroactive imposition of the tax and the court refused to impose such tax retroactively.

A.

We certainly agree with the circuit court's findings of fact with regard to appellee's in-state deliveries. Appellee's business is a continuation of the transportation of goods from other states to points in West Virginia, but with regard to deliveries it makes in-state, the only ones in question here, *its* business begins and ends in West Virginia. It is true that the shipments consigned to appellee are prepackaged and pre-billed by the out-of-state shipper and that appellee is paid by the out-of-state shipper and not by the ultimate consignee. It is true that the meat packers are engaged in interstate commerce and appellee may also be engaged in interstate commerce. But *Code*, 11-12A-2 [1967, 1971] does not distinguish between interstate and intrastate commerce. Appellee's business consists of taking meat from one place in West Virginia and delivering it to another place in West Virginia and such a business is clearly taxable under *Code*, 11-12A-2 [1967, 1971] as business "beginning and ending" in West Virginia.

We disagree with the circuit court's conclusion that taxing appellee on this business amounts to retroactive application of new law for the reasons outlined in the introduction to these cases. We only add that retroactivity is not an issue here because we are not overruling any prior decisions.

B.

However, we do find it necessary to take up the question raised by appellee that the State is estopped from making this assessment by virtue of the 1964 decision of the Tax Commissioner. The record discloses that the Assistant Tax Commissioner adjusted an assessment made against appellee for 1958-62 "under the provisions of Chapter 11, Article 12A of the Code of West Viginia." In testimony, appellee's president stated that this adjustment held appellee liable for taxes under *Code*, 11-12A-4 [1962] only for deliveries made for West Virginia meat packers to West Virginia customers, but not for deliveries made for out-of-state packers to West Virginia customers. We will assume *arguendo* that this is so.

The question is what effect does such a ruling by the Tax Commissioner have on an attempt to assess the same taxpayer under a different statute (albeit a "substantial re-enactment" of the previous one, *see Chesapeake and Potomac Co. v. State Tax Dep't.* ——W. Va.——, 239 S.E.2d 918, 925 (1977) and for different years. The Tax Commissioner was empowered at the time of the previous assessment to conduct hearings on petitions by taxpayers for reassessment and to issue rulings based on the hearings. It was further provided that "unless an appeal is taken within thirty days from service of this notice [of the ruling], the tax commissioner's decision shall be final," *Code*, 11-12A-

8(c) [1962]. The current assessment is governed by substantially the same language in *Code*, 11-12A-12 [1967], and assessments since 1978 are governed by *Code*, 11-10-10 [1978].

In *Cunningham v. County Court of Wood County*, 148 W. Va. 303, 134 S.E.2d 725, 729 (1964), we stated that the "general rule is that an estoppel may not be invoked against a governmental unit when functioning in its governmental capacity." Both parties agree that tax collection is a governmental, as opposed to proprietary, function. To the extent that *Code*, 11-12A-8(c) [1962] is in derogation of the common law rule enunciated in *Cunningham*, *supra*, it binds the State with respect to assessments for particular taxpayers, particular years, and particular taxes. Thus the Tax Commissioner could not attempt to assess West Virginia Motor Delivery for taxes under *Code*, 11-12A-4 [1962] after thirty days had passed from his decision on the matter for the years 1958-62. However, the 1964 ruling is in no way binding with respect to assessments under *Code*, 11-12A-2 [1967, 1971] for the years 1970-73.

If appellee had wanted a definitive ruling from the Tax Commissioner about its prospective liability under *Code*, 11-12A-2 [1967], it could have done so under the provisions of *Code*, 29A-4-1 *et seq.* [1964]. Those sections set out the declaratory judgment procedures to be used by citizens dealing with State agencies, including the Tax Department, concerning "the applicability to any person, property or set of facts of any rule or statute enforceable by it," *Code*, 29A-4-1 [1964]. Such declaratory judgments may be binding. The *Code* also provides for the hearings and fact-finding procedures necessary to prevent arbitrary, careless, or groundless judgments. *Id.* Finally, these

judgments may be subjected to judicial review, *Code*, 29A-4-2[1964].

C.

We can now briefly address the constitutionality of this tax as applied to this taxpayer. West Virginia Motor Delivery is a West Virginia Corporation. It does business in this State with consignees primarily in this State. There is no question that there is a substantial nexus with the State. The tax in question taxes income derived only from appellee's activities in State, so it is fairly apportioned. Local and interstate commerce must pay the same tax for the same activities, so the tax is not discriminatory. Finally, being a West Virginia corporation located within the State, there is no question that the tax is fairly related to the services provided by the State to appellee. The State provides roads and police protection which are of direct benefit to appellee, and the State provides schools which undoubtedly are used by appellee's employees' children. We conclude that the assessment made by the Tax Commissioner, less penalty, was proper under the statute and under the constitution.

Therefore, the decision of the Circuit Court of Kanawha County is reversed and the case is remanded for proceedings consistent with this opinion.

UNION BARGE LINE CORPORATION

This case presents the question of whether there is sufficient nexus to support a tax on appellee Union Barge Line Corporation and whether the tax is fairly related to the services provided appellee by the State. We find that both questions should be answered in the affirmative and, therefore, we uphold the assessment,

but we remand the case for the determination of certain factual questions concerning the amount of cargo ton miles carried in this State.

In 1972 the State Tax Department assessed Union Barge under *Code*, 11-12A-3 [1967] for net income derived during 1967-70 from Union Barge's so-called one-point and pass-through traffic. One-point traffic involves either carrying goods to a point in this State from another state or carrying goods from West Virginia to another state. Pass-through traffic involves carrying goods from one state to another across West Virginia without stops. In 1977 the Tax Commissioner affirmed a modified version of the assessment, less penalty. Union Barge made a timely appeal to the Circuit Court of Kanawha County in which the assessment was overruled. The Tax Commissioner appeals to this Court from that ruling.

Union Barge Line Corporation is a Pennsylvania corporation not qualified to do business in the State of West Virginia. It is headquartered in Pittsburgh and is engaged in transporting freight in barges along the navigable waters of the United States. A substantial portion of its business travels the Ohio River and a small amount travels along the Kanawha River. The bed of the Kanawha River belongs to West Virginia as does the bed of the Ohio River up to the low water mark on the Ohio side. The United States controls the waters of both rivers. The Company tows some barges between two points within West Virginia but such traffic comprises only one fifteen-hundredth (1/1500) of all its traffic everywhere, according to 1977 figures. Union Barge did pay taxes on this traffic during the audit years but it payed no tax on the far more substantial one-point and pass-through traffic which occurred in West Virginia.

Union Barge does not maintain an office or place of business in West Virginia and it does not have any agents or employees in the State. The circuit court found that appellee does not use any docks, properties, facilities, or services of the State of West Virginia or any of its subdivisions. The United States government is responsible for the regulation and servicing of navigable waterways, of which the Ohio and Kanawha Rivers are a part. Accordingly, the court determined that there was insufficient nexus between Union Barge and the State to support imposition of any tax. In this regard, it found controlling *American Barge Line Co. v. Koontz*, 136 W. Va. 747, 68 S.E.2d 56 (1951). There this Court held in a factually similar situation that the impositon of a privilege tax on apportioned gross income of a barge company was an undue burden on interstate commerce. We also stated that "there is certainly no taxable incident in connection with through traffic of the plaintiffs occurring within the State of West Virginia which would afford a basis for the tax," *id.* at 63.

We disagree with the circuit court's ruling and therefore reverse. To the extent that *American Barge* invalidated the application of a different tax, it is not binding in the case at bar. To the extent that it is inconsistent with the findings *infra* concerning nexus, it is overruled. We find that there is sufficient nexus between Union Barge and this State to support the imposition of a tax on it and that the tax in question is fairly apportioned, non-discriminatory, and fairly related to the services provided appellee by the State.

A.

Appellee is engaged in business which begins and ends within West Virginia for which it payed taxes

under *Code*, 11-12A-2 [1967]. Inasmuch as the question is whether there is a substantial nexus between a taxpayer and the State to support the imposition of any tax, the fact that appellee does not contest the validity of taxing its wholly in-state business is at least persuasive that some nexus exists with regard to some operations. That, however, is not dispositive since arguably appellee could have identifiable, separate, business operations which are so far removed from this State as to make them immune to our taxation.

However, the activities in question do involve a West Virginia "nexus" since our view of the record suggests that appellee has far more substantial contacts with this State than were found by the circuit court. Appellee's vice-president testified that its wholly in-state business was primarily done to accommodate its interstate customers or to accomodate other carriers. This suggests that its in-state business, while small, was helpful in the maintenance of other one-point and pass-through business. Approximately four percent of appellee's total cargo ton miles passed through West Virginia on one-point business. Approximately six percent of appellee's total cargo ton miles travel through West Virginia as pass-through traffic. This suggests substantial activity conducted within the State.

Appellee owns almost all of the barges it tows. When appellee's barges are dropped off for loading and unloading in this State, they are docked for days at a time at docks owned by companies doing business in this State. It should not matter, contrary to the circuit court's suggestion, that the docks are owned by private corporations and not by the State of West Virginia. Appellee charges its customers a demurrage tariff for undue delay in loading and unloading of the

barges. This is income earned exclusively in this State as the result of one-point business in West Virginia.

Appellee at times buys food and fuel for its tugboats and crews from West Virginia businesses along the rivers, although this is an infrequent occurrence. It also sometimes uses West Virginia as drop-off and pick-up points for its employees, some of whom live in West Virginia. Should any of the barges or tugs break down or become damaged in West Virginia, appellee will at times have them repaired in this State or send its own crews here to inspect and/or repair the equipment.

B.

Given this factual basis, there are numerous Supreme Court cases which support the conclusion that there is a substantial nexus between taxpayer and the State in this case to support taxation. *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1940) involved the imposition of an *ad valorem* tax on barge companies based on the number of miles of their lines in Louisiana, the state of taxation, compared with the number of miles in the lines overall. The Court noted at 170-71 that:

> In the trips to Louisiana a tugboat brings a line of barges to New Orleans where the barges are left for unloading and reloading. Then the tugboat picks up loaded barges for return trips to ports outside that State . . . [The] turn-arounds are accomplished as quickly as possible with the result that the vessels are within Louisiana for such comparatively short periods of time as are required to discharge and take on cargo and to make necessary and temporary repairs.

This is almost identical to the description we have of appellee's one-point operations in West Virginia. There

the Supreme Court held that there was sufficient nexus for the imposition of the *ad valorem* tax.

Undoubtedly appellee will protest that in *Ott, supra*, the taxpayers each had an office or agent in Louisiana while appellee has neither office nor agent in West Virginia. We find such protest without merit. The existence of an office or agent in Louisiana was given no emphasis in the Court's determination of that case. The controlling factor was that the appellees were engaged in business in the state and they had property there that could be taxed. Towing barges which were docked in Louisiana provided the nexus; with that established, "the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State. [Citation omitted.] Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the State." *Id.* at 174.

We conclude on the basis of *Ott* and the factual analysis presented above that the assessment here meets three criteria of *Complete Auto:* appellee's one-point business alone is sufficient to provide the substantial nexus necessary for taxation by the State;[3] the

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[3]*See, too, Standard Oil Co. v. Peck*, 342 U.S. 382, 382-83 (1952) (*Ott* "placed inland water transportation on the same constitutional footing as other interstate enterprises"); *Braniff Airways, Inc. v. Nebraska Bd. of Equalization*, 347 U.S. 590, (1954) (upholding *ad valorem* tax on aircraft; issue "develops into the question of whether eighteen stops per day by appellant's aircraft is sufficient contact with Nebraska to sustain that state's power to levy an apportioned *ad valorem* tax on such aircraft," at 600-01, answered affirmatively); *Alaska v. Arctic Maid*, 366 U.S. 199 (1961) (upholding Alaska licensing tax on freezer ship assessed against value of fish stored; tax valid even though ship never entered Alaska waters because local fishermen sold fish to the ship and the ship sent long-boats into Alaska waters); *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 442 (1979) ("various instrumentalities of commerce may be taxed, on properly apportioned basis, by the nondomiciliary States through which they travel") (dictum). It is true that most of these cases deal with property taxes, but we find that irrelevant to the issue of nexus because nexus has to do with the power of the states to

(Footnote continued on page 27a)

tax in *Code*, 11-12A-3 [1967] is fairly apportioned in that it is assessed on the portion of net income which is derived from in-state activities; and, it does not discriminate against interstate commerce by making it pay higher taxes than local commerce.

C.

The appellee asserts that the Tax Commissioner has not demonstrated that appellee derives any benefits from the State and, therefore, the tax fails on the fourth criterion—its relation to benefits received. However, the burden is on the taxpayer to show that the inferences of benefits received through its in-state activities are unfounded. "In this type of case the taxpayers must show that the formula places a burden upon interstate commerce in a constitutional sense," *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 463 (1959). Appellee's barges are docked at piers in West Virginia for substantial periods throughout the year and there is every reason to believe that they are provided with police and fire protection by the State. Appellee's vice-president testified that if a crewman becomes ill while traveling through West Virginia he may be taken to a West Virginia hospital, and most hospitals receive some State aid.

In section A we outlined a variety of services and opportunities available to and used by appellee that are provided by people in West Virginia. Certainly these things contribute to the viability of appellee's operations overall. This contribution, protected by the State, is something for which the State, in the name of

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levy taxes. As appellee states in its brief, "the form of the tax is irrelevant to the due process questions of nexus and state benefits." These cases establish that West Virginia may constitutionally tax barge companies whose equipment passes through the State so long as the other criteria of the *Complete Auto* test are met.

the people of West Virginia, can ask for taxes in return. "A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the State has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society," *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 445 (1940).

This case must be remanded to the circuit court for further proceedings, however, because the appellee did raise a substantial factual matter with regard to apportionment which was not resolved by the circuit court. The appellee alleges that the Ohio River has shifted so that for some distance, as appellee's barges pass West Virginia, they actually are traveling across Ohio and not this State. If that, in fact, is the case, then the tax assessment should be reduced accordingly.

For the reasons set out above, the decision of the Circuit Court of Kanawha County is reversed and the case is remanded for further proceedings consistent with this opinion.

GENERAL CONCLUSION RELATING TO ALL CASES

Over the years, in interpreting the Commerce Clause, the U.S. Supreme Court has attempted to preserve unencumbered trade among the states while also allowing the states to make interstate commerce pay its own way. *Complete Auto* has expanded and certainly rationalized the taxing powers of the states. It has also provided the courts with a rational and coherent test for state taxes on interstate commerce. However, the semantic niceties which emanated from the Supreme Court decisions before *Complete Auto*

perhaps forced on state legislatures an arbitrary, "tax as tax can" attitude with regard to interstate commerce, thereby producing hodgepodge taxation.

In the four years since *Complete Auto* the arbitrariness has remained. The states perhaps have taken advantage of the expansive aspects of *Complete Auto* more often than is theoretically justified based on the economics of interstate commerce. In some instances the *Complete Auto* test has succeeded in eliminating rapacious new taxes of the sort that the Commerce Clause was designed to prevent, *see, e.g., Maryland v. Louisiana*, ——U.S.—— (1981). Unfortunately, the effect of several new applications of old taxes by different states in combination can be just as rapacious as a single new tax, but this effect can easily go unnoticed. Since each application of an old tax by itself is more likely to satisfy the *Complete Auto* requirements of nexus, fair apportionment, anti-discrimination, and fair relationship, taxpayers must make substantial factual showings if they are to contradict the *prima facie* evidence of constitutionality and prove that the taxes in combination exceed state power or unduly burden interstate commerce. Absent such showings, courts are left no choice but to affirm such taxation.

Hence we realize that the results in the decisions discussed in this opinion as well as in our recent decisions, *Chesapeake and Potomac Co. v. State Tax Dep't.*, ——W.Va.——, 239 S.E.2d 918 (1977) and *J. C. Penney Co., Inc. v. Hardesty*, ——W.Va.——, 264 S.E.2d 604 (1979), may give the appearance that we will allow the State to expand its taxing powers in sponge-like fashion and with only perfunctory review. But this is not the case. The taxpayer's burden of proof in such cases is substantial, but it is not insurmountable nor one established just yesterday, *see Northwestern States*

Portland Cement Co. v. Minnesota, 358 U.S. 450, 463 (1959); *Standard Pressed Steel Co. v. Rev. Dep't. of Washington*, 419 U.S. 560, 563 (1975). In fact, we discussed this same problem less than two years ago in *Richardson, Gordon and Assocs. v. Hardesty*, decided in *J. C. Penney, supra*, ——W.Va.——, 264 S.E.2d 604 (1979). We stated there that for a taxpayer "to avoid a state tax under the Commerce Clause it is necessary to demonstrate sufficient duplication of taxation that there is an actual discrimination against interstate commerce," *id.* at 612. The same burden was enunciated concerning apportionment and relation to services. But there, too, there was no serious effort factually to substantiate the constitutional claims. So *here*, too, we are left exasperated because "there is no development in this record of this particular question other than naked allegations," *id.*

As the U.S. Supreme Court has said, "logically it is impossible, when the tax is fairly apportioned, to have the same income taxed twice. In practical operation, however, apportionment formulas being what they are, the possiblity of the contrary is not foreclosed, especially by levies in domiciliary States. But that question is not before us." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 462-63 (1959). The question was before it, however, in *Norfolk and W. Ry. Co. v. Missouri Tax Comm'n*, 390 U.S. 317 (1968). In that case the Court held that the taxpayer had carried successfully its "heavy burden" by proving that the application of a mileage formula for apportionment had "led to a grossly distorted result," *id.* at 326.

We, too, will be receptive to factual showings by taxpayers involved in interstate commerce that the taxes as applied to them are not properly apportioned,

or that they actually receive no benefits from the State, or that the taxes discriminate against interstate commerce. We stand ready to reverse tax assessments when taxpayers successfully support the heavy burden of proof and the State does not disprove taxpayers' evidence that the imposition of certain taxes is unconstitutional in any of those ways. To help minimize the potential for such unfair taxation, we urge the Legislature to re-evaluate its tax policy concerning interstate commerce and take advantage of the rationalizing potential offered by *Complete Auto* and its progeny.

No. 14636 - Reversed and remanded,
No. 14473 - Reversed and remanded,
No. 14870 - Reversed and remanded.

APPENDIX B

State Tax Department
of West Virginia
Charleston 25305

BEFORE THE TAX COMMISSIONER OF THE STATE OF WEST VIRGINIA

In the Matter of the Petition of
BUSINESS TAX DIVISION
UNION BARGE LINE CORPORATION
DOCKET # 72-1581 T
One Oliver Plaza
Pittsburgh, Pennsylvania 15222
File No. 25 0847 500 001

HEARING EXAMINER HOLDING HEARINGS:
Priscilla H. Gay

TAXPAYER REPRESENTED BY:
Thomas N. Chambers, Attorney at Law
Arthur J. Brosius, Vice-President, Administration
Donald E. Hersh, Manager, State and Local Taxes
Homer I. Gray, Former Chief, Navigation Branch, U.S. Army Corps of Engineers

TAX COMMISSIONER REPRESENTED BY:
Ann Chrisman, Staff Counsel
Russell Miller, Auditing Section

DATE, TIME AND PLACE OF HEARINGS:
May 27, 1977, 10:00 a.m., EDT
June 13, 1977, 1:30 p.m., EDT
State Tax Department
Office of Hearings and Appeals
1217 Quarrier Street
Charleston, West Virginia 25301

ADMINISTRATIVE DECISION

Pursuant to a field audit conducted by the Business Tax Division, Richard L. Dailey, then Tax Commissioner of the State of West Virginia, issued an assessment against Union Barge Line Corporation (herein also referred to as the taxpayer) on November 17, 1972 for carrier income tax in accordance with the provisions of Chapter 11, Article 12A of the Code of West Virginia of 1931, as amended. The assessment was for the period January 1, 1967 through December 3, 1971 for tax in the amount of $42,562.94 with penalty thereon in the amount of $11,697.88 for a total assessed tax and penalty in the amount of $54,260.82.

Taxpayer filed a timely petition for reassessment and the cause was regularly set for hearing after due notice was given to and received by the taxpayer.

The Hearing Examiner, Priscilla H. Gay, having determined that all proper notices and documents required by law had been timely filed, called the matter on to be heard at 10:00 a.m., EDT on the 27th day of May, 1977, in the State Tax Department at Charleston, West Virginia.

A subsequent hearing was held on June 13, 1977 at 1:30 p.m., EDT for the purpose of presenting expert testimony concerning the boundary lines between the States of Ohio and West Virginia.

FACTS

Union Barge Line Corporation operates a barge line for the transportation of freight upon the navigable waterways of the United States. In particular, the taxpayer transports freight upon Gulf intercoastal waterways, the Mississippi River, the Ohio River and its tributaries including the Kanawha River.

The taxpayer neither maintains any offices or places of business in West Virginia nor does it have any agents or employees stationed in the State. The taxpayer is considered a common carrier and contract carrier and holds certificates of convenience from the Interstate Commerce Commission.

The operations for which the assessed tax is claimed are on that portion of the Ohio River that borders on West Virginia (generally, from mile post 40 to mile post 317), and on portions of the Kanawha River within the State of West Virginia. Expert testimony presented by the taxpayer showed that the waters of the Ohio River have risen and moved inwardly in recent years as the result of dam erections. Consequently, certain areas on the Ohio side of the West Virginia-Ohio boundaries, i.e., west of the low water mark are now navigable for barge traffic. To this end, the taxpayer has shown via exhibits that of the 277 miles of waterway bounding West Virginia that 36 miles or 13 percent of the same involves potential barge travel in the State of Ohio.

Transportation performed by the taxpayer on these navigable rivers falls into three categories, to wit: (a) Freight originating at a point outside of West Virginia destined to a point outside of West Virginia, commonly called "through traffic"; (b) freight originating outside of West Virginia destined to a point within West Virginia, or vice versa, herein called "one point traffic"; (c)

freight originating at one point in West Virginia destined to another point in West Virginia, herein called "two point traffic".

The taxpayer does not use any dock, property, facilities or service of the State of West Virginia or any of its subdivisions.

However, the taxpayer does transport freight upon the Ohio River, which is undeniably the property of West Virginia up to the low water mark. The taxpayer also makes use of docks, ports, etc. located in the State of West Virginia in connection with the loading and unloading of transported freight for customers.

During the performance of the audit, the tax examiner found that the taxpayer was reporting only revenues derived from business beginning and ending in West Virginia. No attempt has been made to prorate income from trips beginning in West Virginia and ending at points outside the State or vice versa. Also, the taxpayer had not prorated income from trips beginning and ending outside of West Virginia but which pass through the State in route.

At the outset of the hearing, the taxpayer's representative pointed out certain audit errors contained in the State's working papers. The first of these involved a cargo ton mile factor of .100554% (based upon 1967 statistics) which was intended for use in each of the audit years. In the year 1970, this factor was erroneously written as .10554% thereby resulting in an overstatement of net income tax liability of $636.54. The pronouncement of this error was in no way intended to be a concession since the taxpayer still maintained that the original factor of .100554% was excessive. Also, the taxpayer stated that net transportation income was overstated during the audit period to the

extent that it erroneously included rents, interest and miscellaneous income. The tax imposed on intrastate gross income is not at issue in this proceeding except for certain shipments which the taxpayer maintains were erroneously treated as two point business. It is the taxpayer's position that if gross income were overstated the gross income tax assessment should be reduced by $2,571.62 based upon the submitted exhibits.

ISSUES AND DETERMINATIONS

The primary issue presented for consideration is whether the State of West Virginia can impose a net income tax upon a water carrier engaged in interstate commerce. The taxpayer has relied on the case of *American Barge Line Co. v. Koontz*, 136 W.Va. 747, 68 S.E. 2d 56 (1951), wherein the West Virginia Supreme Court invalidated the privilege tax on prorated gross income derived from interstate commerce. This decision led to the enactment of amended Article 12A which imposed a privilege tax on prorated net income derived from interstate comerce in lieu of the former tax on prorated gross income. This statute was, in turn, held unconstitutional, in *State ex rel. Battle v. Baltimore & Ohio R.R.*, 149 W. Va. 810, 143 S.E. 2d 331 (1965), which resulted in the enactment in 1967 of the present Carrier Income Tax Law.

The taxpayer began filing and paying tax upon two point or intrastate gross income subsequent to the decision in *American Barge Line Co. v. Koontz*. However, the taxpayer did not pay the prorata income tax, gross or net, under the old transportation privilege tax law or under the present carrier income tax law believing that such would be unconstitutional based upon prior State Supreme Court decisions.

In response to the taxpayer's position, it should be noted that the historical development outlined by the taxpayer pertains to the change in the carrier income tax from a tax on the privilege of doing business to a tax on income. Accordingly, it is determined that the constitutional prohibitions addressed in *American Barge Line Co. v. Koontz* and *Battle v. Baltimore & Ohio R.R. Co.* were remedied by the West Virginia Legislaure.

It is the taxpayer's contention that its business activities do not constitute sufficient nexus for imposition of the net income tax upon carriers. In this regard, the taxpayer has again relied on *American Barge Line Co. v. Koontz*. However, it should be recognized that the law of interstate commerce has moved in the direction of sustaining nexus in recent years. In the present matter, the taxpayer is actively engaged in the transportation of cargo upon the Ohio River; the property of which is owned by the State of West Virginia. Moreover, it is mandatory that the taxpayer frequently land on the West Virginia side for the purpose of loading and unloading cargo. These contacts with the State cannot be said to be minimal or insignificant when one considers the business climate which West Virginia is affording as well as the revenue derived therefrom. In this connection, it is important to note that the taxpayer is conducting a viable two point business within the State for which it is paying taxes under the gross income section of the Carrier Income Tax Law. This contact alone could sustain taxation under the "borrowed nexus" theory espoused in *National Geographic Society v. California Board of Equalization* No. 75-1868 (1977). Accordingly, it is determined that the taxpayer's activities do provide adequate nexus to sustain the net income tax.

The second issue presented for determination is whether the net income tax has been fairly apportioned in the instant case. It is true that a potential navigational channel may now exist on the Ohio side of the low water mark. However, no proof was offered to show that the taxpayer has been actively utilizing that portion of the waterway during the audit period. At best, the use of the area west of the low water mark would constitute loop traffic and would therefore remain taxable under the existing case law. In this regard, the record indicates that the taxpayer has made no showing of multiple taxation of business activity which West Virginia has sought to tax. See *Complete Auto Transit, Inc. v. Brady, ..., U. S. ....*, (1977), wherein the U.S. Supreme Court sustained the imposition of the tax on the grounds that it was a nondiscriminatory properly apportioned tax which was related to the corporation's local activities for which the State of Mississippi was justified in asking a fair and reasonable return. The Court also noted that there was no possibility of any other state duplicating the tax involved and, hence, there was no discrimination against interstate commerce. In reaching this opinion, the Court quoted a portion of the decision rendered by the Mississippi Supreme Court which reads:

> It will be noted that Taxpayer has a large operation in this State. It is dependent upon the State for police protection and other State services the same as other citizens. It should pay its fair share of taxes so long, but only so long, as the tax does not discriminate against interstate commerce, and there is no danger of interstate commerce being smothered by cumulative taxes of several states. There is no possibility of any other state duplicating tax involved in this case. *Complete, supra*, 1078.

The third issue raised for consideration is whether the taxpayer's intrastate gross income was overstated during the audit period. A review of the audit working papers indicates that certain "pass through" and "one point" business was erroneously tax as income from intrastate activities. This income will be deleted from the gross income section thereby reducing the tax assessment by $2,554.67.

It is further determined that the taxpayer was correct in claiming that an audit error existed in the cargo ton mile factor for the year 1967 as well as errors in the computation of net transportation income. These modifications will result in a further reduction of tax in the amount of $2,421.68.

It is also determined that the cargo ton mile factor of .100554% which was mutually agreed upon at the time of the audit will remain controlling since the taxpayer presented no evidence to refute the accuracy of the same.

It is finally determined that reasonable cause has been shown for waiver of the remaining penalties.

WHEREFORE, it is the DECISION of David C. Hardesty, Jr., Tax Commissioner of the State of West Virginia, that Union Barge Line Corporation is indebted to the State of West Virginia for carrier income tax for the period January 1, 1967 through December 31, 1971 in the amount of $37,586.59 with all revised penalties being waived.

DAVID C. HARDESTY, JR.
State Tax Commissioner

Date Rendered: Nov. 17, 1977

APPENDIX C

State of West Virginia
THIRTEENTH JUDICIAL CIRCUIT
Kanawha County Courthouse
Charleston, West Virginia 25301

Robert K. Smith, Judge

May 25, 1979

Thomas N. Chambers, Esquire
Kenneth G. M. Mason, Esquire
Jackson, Kelly, Holt & O'Farrell
1500 One Valley Square
P. O. Box 553
Charleston, West Virginia 25322

Thomas J. Steele, Jr., Esquire
Assistant Attorney General
Office of the Attorney General
Tax Division, Room W-435
State Capitol Building No. 1
Charleston, West Virginia 25305

Re: Union Barge Line Corporation
v.
David C. Hardesty, Tax
Commissioner of the State of
West Virginia
Civil Action No. AP-CA-77-163

Gentlemen:

Pursuant to the provisions of West Virginia Code, 11-12A-13, as amended prior to its repeal, effective July 1, 1978, by the West Virginia Tax Procedure and Administration Act, Union Barge Line Corporation, the petitioner before the State Tax Commissioner and the

plaintiff herein, timely filed this appeal for judicial review of the administrative decision of the Tax Commissioner of the State of West Virginia, the defendant herein. The defendant in his administrative decision, dated November 17, 1977, affirmed an earlier assessment of carrier income tax for the period January 1, 1967 through December 31, 1971, as modified by the administrative decision, and ruled that the plaintiff is indebted to the State of West Virginia for $37,586.59 additional carrier income tax for "pass-through business" and "one-point business".

This case is before the Court upon the appeal petition, notice thereof, and a copy of the "Administrative Decision" attached as an exhibit; upon the answer and certified copy of the assessment; upon the transcripts of the administrative hearing before the defendant held on May 27, 1977 and June 13, 1977, and the exhibits filed with the defendant; and upon the briefs of the parties submitted but not of record.

The finding of facts of the defendant in his administrative decision are enumerated as follows:

1. The plaintiff, a Pennsylvania corporation with principal office located at Pittsburgh, Pennsylvania and not qualified to transact business within the State of West Virginia during the assessment period, operates a barge line for the transportation of freight upon navigable waterways of the United States, including the Gulf intercoastal waterways, the Mississippi and Ohio Rivers and tributaries thereof, such as the Kanawha River. Page 2 of the "Administrative Decision" and transcript of administrative hearing on May 27 1977 at 26-28 and 95 (hereinafter Tr. of May 27 at ——).

2. The plaintiff's transportation on these navigable rivers falls into three categories, namely: (1) freight originating at a point outside of West Virginia destined to a point outside of West Virginia, called "pass-through business" in the State of West Virginia's carrier income tax regulations; (2) freight originating at a point outside of West Virginia destined to a point within West Virginia or vice versa, called "one-point business"; and (3) freight originating at one point in West Virginia destined to another point in West Virginia, called "two-point business". Page 3 of the "Administrative Decision".

3. The plaintiff is considered a common carrier and a contract carrier and holds certificates of convenience from the Interstate Commerce Commission. It does not maintain an office or place of business in West Virginia. It does not have any agents or employees located in this State. The plaintiff does not use any dock, property, facilities, or service of the State of West Virginia or any of its subdivisions. Pages 2 and 3 of the "Administrative Decision". Instead, all governmental regulations and services pertaining to the Ohio River and all other navigable rivers are of a federal origin. All river improvements are maintained solely by the federal government, which maintains and controls such rivers as public highways of commerce. Tr. of May 27 at 59 and 68-69 and Tr. of June 13 at 67-68.

4. Expert testimony presented by the plaintiff indicates that the waters of the Ohio River have risen and moved farther easterly and westerly in recent years as the result of dam and lock erections. Consequently, certain areas on the Ohio side of the West Virginia-Ohio boundary, that is, west of the low water mark prior to canalization, are now navigable for barge traffic. To this end, the plaintiff has shown via exhibits

that 36 miles or 13 percent of the 277 miles of the Ohio River bordering West Virginia (that is, from mile post 40 to mile post 317) involves potential barge travel in the State of Ohio. Pages 2-3 of the "Administratve Decision". The barges must enter the State of Ohio at certain locks. Tr. of June 13 at 55.

5. During the assessment period the plaintiff reported and paid tax on only its gross transportation income derived from intrastate or "two-point business" (such as from one point on the Kanawha River to another point thereon). It did not report or pay tax on any apportioned net income from "one-point business" or from "pass-through business". Pages 3-4 of the "Administrative Decision".

6. The plaintiff's "two-point business" is one-half of one percent (0.005) of all of its traffic (cargo ton-miles) that touches West Virginia and one fifteen-hundredths (1/1500) of all of its traffic everywhere, based upon 1977 figures. Tr. of May 27 at 110.

Although there are sub-issues, the primary issue of law presented in this case is whether or to what extent, under the facts of this case, the "one-point" and "pass-through" transportation net income (hereinafter denominated interstate net income) of a "person operating a steamboat or other watercraft" (hereinafter called a water carrier) is subject to the net income tax portion of the West Virginia "Annual Tax on Incomes of Certain Carriers" (hereinafter called the carrier net income tax). The applicability of the intrastate gross income tax portion of the two-tiered carrier income tax is not in question in this case.

The relevant statutory provisions are in West Virginia Code, 11-12A-3, as amended:

> In addition to the tax imposed in the preceding section (intrastate or two-point gross income tax) . . . any person operating a steamboat or other watercraft for the transportation of passengers or freight, doing business in this State shall pay an annual tax for each calendar year on the net income earned within the State equal to . . . six and six-tenths percent of such net income . . . Net income shall be determined as follows:
>
> * * * *
>
> (e) The net income of . . . any person operating a steamboat or other watercraft for the transportation of passengers or freight earned within the State shall be determined by ascertaining a sum bearing the proportion to the total net income of the corporation that its business done in West Virginia, measured in . . . ton-miles in the case of any person operating a steamboat or other watercraft, bears to all business done, measured in like fashion;
>
> * * * *
>
> (g) In computing the tax imposed by this section, the total net income of a taxpayer who shall have been taxed under the preceding section (11-12A-2) (intrastate or two-point gross income tax), shall be reduced by an amount bearing the proportion to such total net income that the gross income of a taxpayer which is the measure of the tax under the preceding section bears to its total gross income from all business done wherever conducted. . . .

West Virginia Code, 11-12A-4, as amended, provides that the effective date for the provisions of Code, 11-12A-3, as amended, *supra*, shall be for all tax years beginning on or after January 1, 1967.

The "Privilege Tax on Certain Carrier Corporations" was enacted in 1933 and in its original form imposed

upon certain carriers, including water carriers, a privilege tax measured by intrastate gross income and a privilege tax measured by apportioned interstate gross income. *American Barge Line Co. v. Koontz*, 136 W. Va. 747, 68 S.E.2d 56 (1951), invalidated the privilege tax measured by apportioned interstate gross income. The Legislatures thereafter amended article 12A to impose a privilege tax measured by apportioned interstate net income in lieu of the former privilege tax measured by apportioned interstate gross income. This amended statute was, in turn, invalidated as unconstitutionally applied in *State ex rel. Battle v. Baltimore & O.R.R.*, 149 W. Va. 810, 143 S.E.2d 331 (1965). As a result, the Legislature repealed the "Privilege Tax on Certain Carrier Corporations" but in 1967, simultaneously "substantially reenacted" the same in the form of the present article 12A, entitled "Annual Tax on Incomes of Certain Carriers". The present article 12A, like its predecessor, is a two-tiered tax in that it provides for an intrastate gross income tax and an apportioned interstate net income tax. The present article 12A differs, however, from its predecessor in that the subject of the tax, as well as the measure, is income, not the privilege of doing business. The economic effect, though, is nearly identical. *See Chesapeake & Potomac Telephone Co. v. State Tax Department*, ...W. Va. ...., 239 S.E.2d 918 (1977).

West Virginia Code, 11-24-9(b), as amended, provides a credit against the West Virginia Corporation Net Income Tax for the amount of carrier income tax payable.

The above quoted statutory provisions must be applied as affected by the Commerce Clause (U.S. Const. art. I § 8) and by the Due Process Clause (U.S. Const. amend. XIV, § 1) as those constitutional provi-

sions are construed by the Supreme Court of the United States and by the West Virginia Supreme Court of Appeals. The Commerce Clause states that "(t)he Congress shall have Power . . . To regulate Commerce . . . among the several States. . . ." The Due Process Clause of the Fourteenth Amendment states that "(n)o State shall . . . deprive any person of . . . property, without due process of law; . . ."

The Court concludes that the carrier net income tax, as applied under the facts of this case to a water carrier's (the plaintiff's) interstate net income, is void as repugnant to the Commerce Clause and to the Due Process Clause of the Fourteenth Amendment, as said clauses are construed by the Supreme Court of the United States and by the West Virginia Supreme Court of Appeals.

The landmark opinion of the Supreme Court of the United States relating to state taxation of interstate business under the Commerce Clause is *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 51 L. Ed. 2d 326, 97 S. Ct. 1076 (1977). The West Virginia Supreme Court of Appeals "wholeheartedly welcome(d) Complete Auto's departure from semantic formalism and its emphasis on functional economic analysis" and applied such analysis in *Chesapeake & Potomac Telephone Co. v. State Tax Department*, ...W. Va. ...., 239 S.E.2d 918 (1977), a case involving the predecessor to the present article 12A of chapter 11 of the Code.

Complete Auto Transit held that a Mississippi tax on the privilege of doing business in that state did not *per se* violate the Commerce Clause when applied to an interstate activity (there the transportation by motor carrier in Mississippi from the railhead immediately to Mississippi dealers of cars manufactured outside the

state). Overruling *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 95 L. Ed. 573, 71 S. Ct. 508 (1951), which had held a tax on the *privilege* of conducting an exclusively interstate business to be *per se* unconstitutional under the Commerce Clause, *Complete Auto Transit* held that any state tax, however labeled ("Privilege", "net income", etc.), will be sustained under the Commerce Clause (absent Congressional action) "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." 430 U.S. at 279, 51 L. Ed. 2d at 331.

In *Complete Auto Transit* the taxpayer did not allege at any stage of the litigation insufficient nexus, unfair apportionment, or that the tax was unrelated to services provided by the state. Before the Supreme Court of the United States, however, the taxpayer alleged that a "privilege" tax "creates an unacceptable risk of discrimination and undue (multiple or cumulative) burdens" but did "not claim that discrimination or undue (multiple or cumulative) burdens exist in fact." 430 U.S. at 278, 51 L. Ed. 2d at 330. *See Northwestern States Portland Cement Co. v. Minneso* 358 U.S. 450, 462-63, 3 L. Ed. 2d. 421, 429-30, 79 S. Ct. 357 (1959) (taxpayer's burden to show multiple taxation in fact by showing defect in apportionment formula in a case involving a tax directly on net income measured by net income).

Related to the nexus, fair apportionment, and related state services factors in the *Complete Auto Transit* Commerce Clause test, is the Due Process Clause or "jurisdiction to tax" standard as explained in *Northwestern States Portland Cement Co. v. Min-*

nesota, 358 U.S. 450, 464-65, 3 L. Ed. 2d 421, 431, 79 S. Ct. 357 (1959):

> Nor will the argument that the exactions contravene the Due Process Clause bear scrutiny. The taxes imposed are levied only on that portion of the taxpayer's net income which arises from its activities within the taxing State. These activities from a sufficient 'nexus between such a tax and transactions within a state for which the tax is an exaction.' (citation omitted) . . . (E)ach of the corporations here was . . . sufficiently involved in local events to forge 'some definite link, some minimum connection' sufficient to satisfy due process requirements. Miller Bros. Co. v. Maryland, 347 U.S. 340, 344, 345, 98 L. ed. 744, 748, 74 S. Ct. 535 (1954). See also Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169, 93 L. ed. 585, 69 S. Ct. 432 (1949); International Shoe Co. v. Washington, 326 U.S. 310, 90 L. ed. 95, 66 S. Ct. 154, 161 A.L.R. 1057 (1945); and West Pub. Co. v. McColgan, 328 U.S. 823, 90 L. ed. 1603, 66 S. Ct. 1378 . . . As was said in Wisconsin v. J. C. Penney, Co., 311 U.S. 435, 85 L. ed. 267, 61 S. Ct. 246, 130 A.L.R. 1229, . . ., the 'controlling question is whether the state has given anything for which it can ask return.' Since by 'the practical operation of (the) tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred . . .' it 'is free to pursue its own fiscal policies, unembarrassed by the Constitution . . .' Id. 311 U.S. at 444.

In 1959, in response to the *Northwestern States Portland Cement* opinion, and pursuant to the Commerce Clause, Congress exercised, to a limited degree, its power to regulate interstate commerce, by enacting 15 U.S.C. § 381. This statute prohibits states (or political subdivisions thereof) from imposing a tax on, or measured by, net income derived by a foreign corporation

or nonresident individual within the state from interstate commerce, if the only business activities within the state is solicitation of orders for sales of tangible personal property, which orders are sent outside the state for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the state.

15 U.S.C. § 381 does not apply to the plaintiff's activities of transporting freight by barges. The "minimum standards" of 15 U.S.C. § 381 apply only to solicitation of orders for sales of tangible personal property. Therefore, case law must be examined to supply the nexus or "local incident" standards in this case.

American Barge Line Co. v. Koontz, 136 W. Va. 747, 68 S.E.2d 56 (1951), which is factually very analogous to this case, is dispositive. There, the taxpayer-water carriers were foreign corporations with "no office or place of business located in West Virginia, nor any employees stationed therein." 136 W. Va. at 749, 68 S.E.2d at 58. The water carriers therein used vessels and barges to transport freight upon the Ohio and Mississippi Rivers and upon the navigable tributaries of those rivers, including the Kanawha and Monongahela Rivers. Like the plaintiff herein, their traffic touching West Virginia fell into three categories, namely: (1) pass-through, (2) one-point and (3) two-point.

Also, as in this case:

> . . . There is no facility furnished by the State of West Virginia, nor is any county or municipality therein used by the plaintiffs in the conduct of their business.
>
> The Ohio, Kanawha, and Monongahela Rivers are navigable streams which have been im-

> proved by the Government of the United States and under its authority.

136 W. Va. at 749-50, 68 S.E.2d at 58.

The water carriers therein engaged in significantly greater two-point or intrastate business than the plaintiff herein. *See* 136 W. Va. at 751, 68 S.E.2d at 59.

The water carriers therein contested the carrier transportation privilege tax measured by apportioned gross income from the interstate (pass-through and one-point) business. The West Virginia Supreme Court of Appeals held in Syllabus Point 2:

> Code, 11-12A-3, authorizing a privilege tax on an apportioned percentage of gross income derived from interstate transportation by navigable streams, on a ton mile basis, unreasonably burdens interstate commerce. That part of the statute so providing contravenes Article I, Section 8, of the Constitution of the United States (Commerce Clause), and it is therefore void.

In reaching this conclusion the Court reasoned:

> There is certainly no taxable incident in connection with through traffic of the plaintiffs occurring within the State of West Virginia which would afford a basis for the tax. And the only incidents occuring in the State of West Virginia connected with one-point interstate traffic is delivery of shipments so classified to their destination, or the acceptance and embarkation of shipments at points in this state destined to points in other states. Those incidents are not sufficient to support the tax.

136 W. Va. at 759-60, 68 S.E.2d at 63.

Hence, there is insufficient nexus to support the carrier net income tax in this case. There are no local incidents or contacts with the State of West Virginia

sufficiently separable from the stream of interstate commerce to which the tax can be apportioned. *See Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 253-54, 82 L. Ed. 823, 826-27, 58 S. Ct. 546 (1938). "(S)ome definite link, some minimum connection" and thereby the jurisdiction to tax is lacking. *See Northwestern States Portland Cement Co. v. Minnesota, supra*, 358 U.S. 450, 464-65, 3 L. Ed. 2d 421, 431, 79 S. Ct. 357 (1959). The plaintiff has no place of business or representatives in this State and does not use any State facilities. It does not load or unload barges in West Virginia. The plaintiff simply makes use of surface water flowing in part through West Virginia. West Virginia has no proprietary interest in the water which flows through it and expends no money maintaining or improving the Ohio River, for example.

Thus, related to insufficient nexus, the tax is not "fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady, supra*, 430 U.S. 274, 279, 51 L. Ed. 2d 326, 331, 97 S. Ct. 1076 (1977). The State has not "given anything for which it can ask return. . . . (T)he state has (not) exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred. . . ." *Northwestern States Portland Cement Co. v. Minnesota, supra*, 358 U.S. 450, 464-65, 3 L.Ed. 2d 421, 431, 79 S. Ct. 357 (1959).

At pages 5-6 of his "Administrative Decision", the defendant concludes that sufficient nexus exists due to "the business climate which West Virginia is affording" the plaintiff and due to the "borrowed nexus" theory of *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 51 L. Ed. 2d 631, 97 S. Ct. 1386 (1977).

The "business climate" theory is untenable. Factually, it is not supported. As discussed above, no State services are provided to the plaintiff. Legally, no authorities have been cited to or located by this Court to support this theory.

The "borrowed nexus" theory does not apply to this case. In the first place, simply put, there is no nexus to borrow. The plaintiff's only connection with West Virginia is through its minuscule "two-point" or intrastate business that utilizes exclusively instruments of interstate commerce (barges and tugs). The plaintiff, unlike the taxpayer in *National Geographic*, has no office or other place of business in the taxing state and has no representative in same. The plaintiff utilizes no docks or other facilities of this State. It does not load or unload barges in this State.

The Supreme Court of the United States expressly hinged its decision in *National Geographic* upon the presence of two sales offices in California, which brought the taxpayer within the statutory definition of a "retailer engaged in business in this state". 430 U.S. at 554 (footnote 2), 556, 51 L. Ed. 2d at 635-36, 637. "The State conceded at oral argument that (National) Bellas Hess (, Inc. v. Department of Revenue, 386 U.S. 753, 18 L. Ed. 2d 505, 87 S. Ct. 1389 (1967),) would have required reversal in the absence of the proof of maintenance of the two offices. . . ." Footnote 6, 430 U.S. at 560, 51 L. Ed. 2d at 639.

The holding in *National Geographic* was "that the Society's continuous presence in California in offices that (only) solicit advertising for its magazine provides a sufficient nexus to justify that State's imposition upon the Society of the duty to act as a collector of the use tax" on mail order sales directly from the District

of Columbia to California offices play no part in the mail order sales. 430 U.S. at 562, 51 L. Ed. 2d at 641.

The Court distinguished a "use-tax-collection duty" of a seller from a "direct" tax. The incidence of the latter is upon the seller, and the direct tax on interstate commerce can be avoided by a "showing that particular transactions are dissociated from the local business. . . .' Norton Co. v. Illinois Rev. Dept. (, 340 U.S. 534) at 537, 95 L. Ed. 517, (520-21,) 71 S. Ct. 377; . . ."

On the other hand,

> "the relevant constitutional test to establish the requisite nexus for requiring an out-of-state seller to collect and pay the use tax is not whether the duty to collect the use tax relates to the seller's activities carried on within the State, but simply whether the facts demonstrate 'some definite link, some minimum connection, between (the State and) the person (italics in *National Geographic*) . . . it seeks to tax.' Miller Bros. v. Maryland, 347 U.S. at 344-45, 98 L. Ed. 744, 74 S. Ct. 535. . . . Here the Society's two offices, without regard to the nature of their activities, had the advantage of the same municipal services—as they would have had if their activities . . . included assistance to the mail-order operations that generated the use taxes.

430 U.S. at 561, 51 L. Ed. 2d at 640.

Therefore, the "borrowed nexus" theory is not applicable to this case for a second reason, namely, such theory does not apply to a direct tax like the carrier net income tax. Instead, the plaintiff has met its burden of "dissociating" (*Norton, supra*) its interstate business from its intrastate business by showing that no local presence contributes to the interstate business.

Moreover, the tail wags the dog to say that the plaintiff's "two-point business"—one-half of one percent of all of the plaintiff's traffic that touches West Virginia and one fifteen-hundredths (1/1500) of all of its traffic everywhere-confers nexus between this State and the plaintiff's "pass-through business" and "one-point business".

Having concluded that the carrier net income tax as applied in this case violates the Commerce Clause and the Due Process Clause of the Fourteenth Amendment, due to insufficient nexus and insufficient State services, it is not necessary to address the issue raised by the plaintiff relating to apportionment for potential or actual transportation by the plaintiff on the Ohio River within the State of Ohio. No other issue is raised on the record.

Accordingly, the Court is of the opinion that the interstate net income tax portion of the assessment is vacated, and no amount is due from the plaintiff to the defendant for carrier net income tax for the assessment period.

An order in conformity herewith should be promptly tendered for entry. Such order should make this letter memorandum of opinion a part thereof. A copy for that purpose may be obtained from my secretary upon presentation of the order.

Very truly yours,
Robert K. Smith

APPENDIX D

IN THE CIRCUIT COURT OF
KANAWHA COUNTY, WEST VIRGINIA

UNION BARGE LINE CORPORATION,

Plaintiffs,

v. CIVIL ACTION NO. AP-CA-77-163
(Judge Smith)

DAVID C. HARDESTY, JR.,
Tax Commissioner of the
State of West Virginia,

Defendant.

ORDER

On or about December 13, 1977, Plaintiff filed its notice of appeal and appeal from the Administrative Decision of the State Tax Commissioner of the State of West Virginia ruling that Plaintiff was indebted to the State of West Virginia in the amount of Thirty-seven Thousand Five Hundred Eighty-six Dollars and Fifty-nine Cents ($37,586.59) for carrier income taxes for the period January 1, 1967, through December 31, 1971.

The Court, after considering the petition and answer of the parties, the Administrative Decision and record of the administrative hearing and the written arguments of counsel for both parties, and in accordance with its letter opinion dated May 25, 1979, which is made a part hereof, does ADJUDGE and DECLARE as follows:

1. That the carrier net income tax as applied to the facts of this case violates the Commerce Clause and the Due Process Clause of the Fourteenth Amendment

to the Constitution of the United States of America due to insufficient nexus and insufficient State services.

2. That the interstate net income tax portion of the assessment is vacated and no amount is due from the Plaintiff to the Defendant for carrier net income tax for the assessment period, as a result of which the assessment is vacated and held for naught.

3. That the Defendant objects and excepts to the rulings hereinabove set forth.

ENTER: 30 day of August, 1979
Robert K. Smith
Judge

PRESENTED BY:

Thomas N. Chambers
Jackson, Kelly, Holt & O'Farrell
P.O. Box 553
Charleston, West Virginia 25322
Counsel for Plaintiffs

APPROVED BY:

Robert Digges, Jr.
Assistant Attorney General
Tax Division
W-435, State Capitol
Charleston, West Virginia 25305
Counsel for Defendant

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS.

I, Phyllis J. Rutledge, Clerk of the Circuit Court of said County and In said State, do hereby certify that

the foregoing is a true copy from the records of said Court.

Given under my hand and the seal of said Court this 30 day of August, 1979

Clerk
Circuit Court
Kanawha County, West Virginia

APPENDIX E

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 17th day of July, 1981, the following order was made and entered, to-wit:

Union Barge Line Corporation, Plaintiff Below, Appellee

vs. 14870

David C. Hardesty, Jr., Tax Commissioner of the State of West Virginia, Defendant Below, Appellant

Upon an appeal from a judgment of the Circuit Court of Kanawha County rendered on the 30th day of August, 1979.

The Court having maturely considered the transcript of the record herein, and the argument and briefs of counsel thereon, is of opinion for reasons stated in writing and filed with the record that there is error in said judgment. It is therefore considered and ordered by the Court that the judgment of the Circuit Court of Kanawha County rendered on the 30th day of August, 1979, be, and the same is hereby, set aside, reversed and annulled, and that the appellant do recover of and from the appellee his costs about the prosecution of his appeal in this Court in this behalf expended. AND this action is remanded to the Circuit Court of Kanawha County for further proceedings according to the principles stated in the written opinion aforesaid and further according to law; all of which is ordered to be certified to the Circuit Court of Kanawha County.

The syllabus of points adjudicated, prefixed to the written opinion prepared by Justice Neely, was concurred in by Chief Justice Harshbarger, Justices Miller, McGraw and McHugh.

A True Copy

Attest: George W. Singleton
Clerk Supreme Court of Appeals

APPENDIX F

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 8th day of October, 1981, the following order was made and entered, to-wit:

if060Union Barge Line Corporation, Plaintiff Below, Appellee

vs. 14870

David C. Hardesty, Jr., Tax Commissioner of the State of West Virginia, Defendant Below, Appellant

The Court having maturely considered the petition for rehearing and reargument filed in the captioned action is of opinion to and doth hereby deny the prayer of the petition and doth order that the final order entered herein be made absolute and certified as heretofore directed. Justice McHugh deeming himself disqualified, did not participate in the consideration of this action. Chief Justice Harshbarger absent.

A True Copy

Attest: George W. Singleton
Clerk Supreme Court of Appeals

APPENDIX G

No. 14870

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

UNION BARGE LINE CORPORATION,
Plaintiff Below, Appellee,
v.
DAVID C. HARDESTY, JR.,
Tax Commissioner of the
State of West Virginia,
Defendant Below, Appellant.

Filed December 9, 1981
George W. Singleton,
Clerk of the Supreme Court
of Appeals of West Virginia

NOTICE OF APPEAL TO
THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Union Barge Line Corporation, the Appellee above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Appeals of West Virginia entered in this action on July 17, 1981, reversing the trial court's judgment and holding Chapter 11, Article 12, Section 3 of the Code of the State of West Virginia constitutional as applied to the Appellee.

This appeal is taken pursuant to 28 U.S.C. §1257(2) and within ninety (90) days of the denial of the Appel-

lee's petition for rehearing by the aforesaid West Virginia Supreme Court of Appeals.

UNION BARGE LINE CORPORATION
By Counsel
THOMAS N. CHAMBERS
Of Counsel

JACKSON, KELLY, HOLT & O'FARRELL
THOMAS N. CHAMBERS
1500 One Valley Square
P. O. Box 553
Charleston, West Virginia 25322

Counsel for Appellee

APPENDIX H

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States

Article I, Section 8, Clause 3 of the United States Constitution:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes.

Fourteenth Amendment, United States Constitution, Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

West Virginia Code of 1931, as amended.

Chapter 11, Article 12A, Section 2 of the Code of West Virginia:

> Every motor vehicle carrier operating on the public highways of this State and every railroad car carrier, railroad carrier, express company, pipeline company, telephone and telegraph company, airline company and any person operating a steamboat or other watercraft, for the transportation of passengers of freight, doing business in the State shall pay to the State an annual tax for each calendar year. This tax shall be equal to the gross income from all business

beginning and ending within the State multiplied by the respective rates as follows: Motor vechile carriers, railroad car carrier, railroad carrier, express companies, pipeline companies, airline companies, any person operating a steamboat or other watercraft and telegraph companies, three and three-tenths percent, and telephone companies, three and seventy-four one hundredths percent: Provided, that any motor vehicle carrier which is an urban or suburban bus line shall be taxed at the rate of one and sixty-five one hundredths percent of such gross income and any motor vehicle carrier which is a taxi or cab company or a company which hauls waste, refuse or garbage shall be taxed at the rate of two and five-tenths percent of such gross income. [Provided, however, that a motor vehicle carrier which transports goods within the State of West Virginia and which received those goods as a connecting carrier in an uninterrupted continuation of interstate transportation done under the authority of a certificate of convenience and necessity issued by the interstate commerce commission, shall be taxed pursuant to subdivision (a) of section three [§11-12A-3] of this article. This provision shall apply only to the transportation of goods carried within the State without a container change or warehousing.][1]

Chapter 11, Article 12A, Section 3 of the Code of West Virginia:

In addition to the tax imposed in the preceding section [§11-12A-2], every motor vehicle carrier operating on the public highways of the State and every railroad carrier, railroad car carrier, express company, pipeline company, telephone and telegraph company, airline company and any person operating a steamboat or other watercraft for the transportation of passengers

[1]The bracketed language was added by way of amendment effective March 8, 1980.

or freight, doing business in this State shall pay an annual tax for each calendar year on the net income earned within the State equal to three and seventy-four one-hundredths percent of such net income for telephone companies and six and six-tenths percent of such net income for all other carriers included in this section: Provided, that any motor vehicle carrier which is an urban or suburban bus line or a taxi or cab company or a company which hauls waste, refuse or garbage, five percent of such net income. Net income shall be determined as follows:

(a) The net income of motor vehicle carriers earned within the State [including two point business in a continuation of interstate commerce without a container change or warehousing][2] shall be determined by ascertaining a sum bearing the proportion to the total net income of the motor vehicle carrier that its business done in West Virginia measured in motor vehicle miles of motor vehicle carrier operation, bears to all business done;

(b) The net income of railroad carriers earned within the State shall be determined by ascertaining a sum bearing the proportion to total net income of the carriers that its business done in West Virginia, measured in ton-miles, bears to all business done, measured in like fashion:

(c) The net income of railroad car carriers and express companies earned within the State shall be determined by ascertaining a sum bearing the proportion to the total net income of the carriers or company that its business done in West Virginia, measured in car-miles of car operation, bears to all business done, measured in like fashion: Provided, however, that nothing in this article shall be construed as applying to railroad

[2]The bracketed language was added by way of amendment effective March 8, 1980.

freight car carriers not owned by railroad carriers or their subsidiaries;

(d) The net income of pipeline companies earned within the State shall be determined by ascertaining a sum bearing the proportion to the total net income of the company that its business done in West Virginia, measured in barrel-miles in the case of oil and liquid coal or slurry and of thousand cubic feet-miles in the case of gas, bears to all business done, measured in like fashion;

(e) The net income of airline companies and any person operating a steamboat or other watercraft for the transportation of passengers or freight earned within the State shall be determined by ascertaining a sum bearing the proportion to the total net income of the corporation that its business done in West Virginia, measured in passenger-miles in the case of airline companies and ton-miles in the case of any person operating a steamboat or other watercraft, bears to all business done, measured in like fashion;

(f) The net income of telephone and telegraph companies shall be determined by ascertaining a sum bearing the proportion to the total net income of the companies that its business done in West Virginia, measured in wire-miles, bears to all business done, measured in like fashion;

(g) In computing the tax imposed by this section, the total net income of a taxpayer who shall have been taxed under the preceding section [§11-12A-2] shall be reduced by an amount bearing the proportion to such total net income that the gross income of the taxpayer which is the measure of the tax under the preceding section [§11-12A-2] bears to its total gross income from all business done wherever conducted. No county, city, town, village or other political sub-

division of the State shall levy a license, net income or any other kind of tax on the business taxed under this article.

Motion to Dismiss or Affirm

Supreme Court, U.S.
FILED
APR 1 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1267

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

UNION-MECHLING CORPORATION,

Appellant,

v.

HERSCHEL H. ROSE, III,
Tax Commissioner of the State of West Virginia,

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MOTION TO DISMISS OR AFFIRM

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No. 81-1267

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

UNION-MECHLING CORPORATION,

Appellant,

v.

HERSCHEL H. ROSE, III,
Tax Commissioner
of the State of West Virginia,

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MOTION TO DISMISS OR AFFIRM

This appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Appeals of West Virginia on the grounds that it is manifest that this appeal does not present a substantial federal question, that the

judgment below clearly rests on an adequate nonfederal basis, and on other grounds which this appellee will present herein which establish that this Court should not set this case for argument.

OPINIONS BELOW

The opinion below by Justice Neely of the Supreme Court of Appeals of West Virginia is reported in Western Maryland Ry. Co. v. Goodwin, __ W. Va. __, 282 S.E.2d 240 (1981). A copy of the opinion below is set out in full in Appendix A--appended to appellant's Jurisdictional Statement.

The May 25, 1979, memorandum opinion of the Circuit Court of Kanawha County, West Virginia, is set out in full in Appendix C--appended to appellant's Jurisdictional Statement. The Kanawha County Circuit Court's judgment of August 30, 1979, is set out in full in Appendix D--appended to appellant's Jurisdictional Statement.

JURISDICTION

The proceeding below began with an assessment of tax under the West Virginia Carrier Income Tax, Chapter 11, Article 12A, of the West Virginia Code of 1931, as amended. The assessment was upheld by the Tax Commissioner of the State of West Virginia upon evidence taken at an administrative hearing. Upon timely appeal to the Circuit Court of Kanawha County, the Tax Commissioner's decision was reversed and the assessment was expunged. The circuit court's decision was reversed by the Supreme Court of Appeals of West Virginia and judgment was entered in favor of the appellee.

The judgment of the Supreme Court sought to be reviewed was entered on July 17, 1981. Subsequently, the appellant petitioned for a rehearing, which petition was denied by order entered October 8, 1981. The appellant then filed a notice of appeal to this Court with the Supreme Court of Appeals of West Virginia on December 9, 1981.

The asserted jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved in the case are cited below and their full text is set forth in Appendix H--appended to appellant's Jurisdictional Statement.

United States Constitution, Article I, Section 8, Clause 3.

United States Constitution, Fourteenth Amendment, Section 1.

West Virginia Code of 1931, as amended, Chapter 11, Article 12A, Section 3.

QUESTIONS PRESENTED

The appellee respectfully disagrees with the appellant's presentation of the questions raised by the Jurisdictional Statement and feels the following more fairly represents the questions presented for review:

1. Whether Code 11-12A-3 is violative of the Commerce Clause or Due Process Clause of the United States Constitution when used as a basis to tax that portion of a barge line corporation's income derived from the interstate transportation of freight on the navigable waterways of the State of West Virginia when such corporation maintains no office or place of business within the State.

2. Whether the State of West Virginia's taxation of a barge line corporation's transportation of freight on the navigable waterways of West Virginia is in proper proportion to the barge line's activities within the State

and therefore to their consequent enjoyment of the opportunities and protections which the State has afforded in connection to those activities.

3. Whether an apportioned net income tax levied upon that portion of a barge line corporation's interstate movement occurring within the taxing state meets constitutional nexus requirements.

STATEMENT OF THE CASE

Union-Mechling Corporation is a Pennsylvania corporation not qualified to do business in the State of West Virginia. Union-Mechling does not maintain an office or place of business in West Virginia, and it does not have any agents or employees in the State. It is headquartered in Pittsburgh and is engaged in transporting freight in barges along the navigable waters of the United States. A substantial portion of its business travels the Ohio River and a small amount travels along the Kanawha River. The bed of the Kanawha River

belongs to West Virginia as does the bed of the Ohio River up to the low water mark on the Ohio side. The United States controls the waters of both rivers. The company tows some barges between two points within West Virginia but such traffic comprises only one fifteen-hundredth (1/1500) of all its traffic everywhere, according to 1977 figures. Union-Mechling did pay taxes on this traffic during the audit years but it paid no tax on the far more substantial one-point and pass-through traffic which occurred in West Virginia.

In 1972 the West Virginia State Tax Department assessed Union-Mechling under Code 11-12A-3 (1967) for net income derived during 1967-1970 from Union-Mechling's so-called one-point and pass-through traffic. One-point traffic involves either carrying goods to a point in this State from another state or carrying goods from West Virginia to another state. Pass-through traffic involves carrying goods from one state to another across West Virginia without

stops. In 1977 the Tax Commissioner affirmed a modified version of the assessment less penalty. Union-Mechling made a timely appeal to the Circuit Court of Kanawha County in which the assessment was overruled.

The Kanawha County Circuit Court found that Union-Mechling did not use any docks, properties, facilities, or services of the State of West Virginia or any of its subdivisions. The United States Government is responsible for the regulation and servicing of navigable waterways, of which the Ohio and Kanawha rivers are a part. Accordingly, the court determined that there was insufficient nexus between Union-Mechling and the State to support imposition of any tax.

The West Virginia State Tax Commissioner appealed the Kanawha County Circuit Court's decision to the Supreme Court of West Virginia on March 23, 1980. In an opinion issued July 17, 1981, the West Virginia Supreme Court reversed the

circuit court finding that there was sufficient nexus between Union-Mechling and the State of West Virginia to support the imposition of a tax on it and that the tax in question, Code 11-12A-3, was fairly apportioned, nondiscriminatory, and fairly related to the services provided appellee by the State.

ARGUMENT

THE APPELLANT'S TRANSPORTATION BUSINESS ACTIVITIES CARRIED ON WITHIN WEST VIRGINIA PROVIDE THE NEXUS NECESSARY FOR THE IMPOSITION OF WEST VIRGINIA'S APPORTIONED CARRIER NET INCOME TAX AND THE MEASURE OF SUCH TAX, BY VIRTUE OF ITS APPORTIONMENT FORMULA, IS INTRINSICALLY RELATED TO BENEFITS AND PROTECTIONS AFFORDED BY THE STATE.

Since the questions presented for review are closely interrelated, the appellee will consolidate its argument into a single presentation.

Before this Court directs its attention to the constitutional considerations

raised by the appellant in this matter, it would be valuable to examine the nature of the tax at issue. Chapter 11, Article 12A, Section 3, of the West Virginia Code of 1931, as amended, which imposes the carrier net income tax reads in pertinent part as follows:

> "In addition to the tax imposed in the preceding section, every motor vehicle carrier operating on the public highways of the State and every railroad carrier, railroad car carrier, express company, pipeline company, telephone and telegraph company, airline company and any person operating a steamboat or other watercraft for the transportation of passengers or freight, doing business in this State shall pay an annual tax for each calendar year on the net income earned within the State equal to three and seventy-four one hundredths percent of such net income for telephone companies and six and six-tenths percent of such net income for all other carriers included in this section: Provided, that any motor vehicle carrier which is an urban or suburban bus line or a taxi or cab company or a company which hauls waste, refuse or garbage, five percent of such net income. Net income shall be determined as follows:

* * *

"(e) The net income of airline companies and any person operating a steamboat or other watercraft for the transportation of passengers or freight earned within the State shall be determined by ascertaining a sum bearing the proportion to the total net income of the corporation that its business done in West Virginia, measured in passenger-miles in the case of airline companies and ton-miles in the case of any person operating a steamboat or other watercraft, bears to all business done, measured in like fashion;

* * *

"(g) In computing the tax imposed by this section, the total net income of a taxpayer who shall have been taxed under the preceding section, shall be reduced by an amount bearing the proportion to such total net income that the gross income of the taxpayer which is the measure of the tax under the preceding section bears to its total gross income from all business done wherever conducted. No county, city, town, village or other political subdivision of the State shall levy a license, net income or any other kind of tax on the business taxed under this article. (1933, Ex. Sess., c. 33; 1933, 2nd Ex. Sess., c. 60;

1943. c. 86; 1959, c. 165; 1962, c. 27; 1967, c. 187; 1971, c. 169.)"

The tax levied by the above statute is a general revenue tax exacted for the support of the cost of government. Carriers transporting passengers or freight are taxed on net income earned from that portion of their transportation business conducted within West Virginia. The carriers' net income subject to the tax is apportioned on the basis of miles traveled in West Virginia vis-a-vis total miles traveled. The apportionment formula thus limits the subject of the tax to that net income earned from transportation business conducted wholly in the State.

In the case at bar, appellant made use of the navigable waterways of the State of West Virginia for the operation of its business. It is uncontested that appellant's transportation business conducted in the State produced that portion of the income the State taxed. Yet,

appellant contends that its transportation operations, physically conducted in West Virginia, lack sufficient nexus with the State for their taxation. Appellant bases such contention on the premise that the benefits provided by the State of West Virginia to it are insufficient to establish the requisite nexus.

Appellant's argument represents a disjointed mixture of the Due Process Clause and Commerce Clause requirements, concerning proper state taxation of interstate activities, combined in such a way as to create far more stringent criterion than actually required. Appellee submits that when this Court examines the incidence of the West Virginia carrier net income tax as it relates to appellant's in-State presence and business activities, it will be apparent that the West Virginia Supreme Court of Appeals' finding of sufficient nexus and commensurate benefits provided is clearly correct in all respects.

The first constitutional question in determining the propriety of a net income tax on interstate transactions is whether the Due Process Clause requirements have been satisfied. In Commonwealth Edison Co. v. State of Montana, __ U.S. __, 69 L. Ed. 2d 884, 101 S. Ct. __ (1981), this Court recognized that states have wide latitude in imposing revenue taxes like West Virginia's carrier income tax. The Court noted that revenue taxes unlike "user" taxes were not imposed by the state for the use of state-owned or maintained facilities and there was no due process requirement that taxes collected from a particular activity must be reasonably related to the value of services provided to that activity. This Court then quoted the following general rule:

> "'Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied.
>
> "'A tax is not an assessment of benefits. It is, as we

> have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve abandonment of the most fundamental principle of government --that it exists primarily to provide for the common good.' Carmichael v. Southern Coal & Coke Co., 301 US 495, 521-522, 81 L Ed 1245, 57 S Ct 868, 109 ALR 1327 (1937) (citations omitted)." 69 L. Ed. 2d at 897.

The two legitimate considerations with regard to due process restrictions on a state's power to tax income generated by the activities of an interstate business are set out in Moorman Mfg. Co. v. Bair, 437 U.S. 267, 57 L. Ed. 2d 197, 98 S. Ct. 2340 (1978), as follows:

> "First, no tax may be imposed unless there is some minimal connection between those activities and the taxing State.

> National Bellas Hess, Inc. v. Department of Revenue, 386 U. S. 753, 756. * * * Second, the income attributed to the State for tax purposes must be rationally related to 'values connected with the taxing State.' Norfolk & Western R. Co. v. State Tax Comm'n, 390 U. S. 317, 325." Id. at 437 U.S. 273.

The first due process restriction relates to the nexus and holds that a state may levy a fairly apportioned net income tax on interstate business if there is a "minimal connection" between the state and the income producing activities. National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753, 18 L. Ed. 2d 505, 87 S. Ct. 1389 (1967), defined minimal connection as a definite link between a state and the person, property or transaction it seeks to tax. In the instant case, West Virginia is taxing appellant's net income earned from interstate transportation of property. An identifiable portion of such transportation occurs in West Virginia, and only that portion is subject to the State's carrier net income tax. Such

in-State presence of the person and property of the appellant in furtherance of its business transactions more than establishes the minimal connection necessary to accord the State of West Virginia the right to levy its apportioned carrier net income tax. Said tax by virtue of the apportionment formula reaches only that income attributable to activities within the State and nexus is inherent in the practical operation of the tax.

The second Due Process Clause requirement delineated in Moorman, supra, was analyzed by this Court in footnote 5 of Norfolk & Western Railway v. Missouri State Tax Commission, 390 U.S. 317, 19 L. Ed. 2d 1201, 88 S. Ct. 995 (1968). The court reasoned in part as follows:

> "'So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State. See Wisconsin v J. C. Penney Co., 311 US 435, 444 [85 L ed 267, 270, 61 S Ct 246, 130 ALR 1229].

> Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the State.' Ott v Mississippi Valley Barge Line Co., 336 US 169, 174, 93 L ed 585, 589, 69 S Ct 432 (1949). * * *" (Emphasis supplied.)

The above language clearly establishes with respect to the Due Process Clause that properly apportioned net income taxes are fairly related to opportunities, benefits or protections accorded by the taxing state. Since in the instant case appellant does not challenge the validity of West Virginia's carrier income tax apportionment formula, there is no genuine issue with regard to the State benefits due process test. West Virginia's carrier net income tax, by virtue of its apportionment formula, is intrinsically related to opportunities, benefits and protections afforded by the State.

Inasmuch as Due Process Clause restrictions clearly do not preclude the constitutional levy of West Virginia's

carrier net income tax in this case, only the Commerce Clause prohibitions could affect the validity of the imposition of the State's tax on appellant's West Virginia business activities. An examination of the Commerce Clause limitations on the power of a state to tax interstate commerce should be initiated with certain general principles in mind.

In Commonwealth Edison, supra, this Court placed the Commerce Clause constitutional protections of interstate commerce in proper perspective. This Court stated the following:

> "There is no reason to suppose that this latitude afforded the States under the Due Process Clause is somehow divested by the Commerce Clause merely because the taxed activity has some connection to interstate commerce; particularly when the tax is levied on an activity conducted within the State. 'The exploitation by foreign corporations [or consumers] of intrastate opportunities under the protection and encouragement of local government offers a basis for taxation as unrestricted as

> that for domestic corporations.' * * *" Id. at 69 L. Ed. 2d 898.

This Court based the above declaration on its longstanding position that it was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of state tax burdens. Concurrently, this Court in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 51 L. Ed. 2d 326, 97 S. Ct. 1076 (1977), has recognized that a state has a significant interest in exacting from interstate commerce its fair share of the cost of state government. Therefore, the Commerce Clause's constitutional concern in state taxation is simply whether a state is making a fair demand of that aspect of interstate commerce to which the state bears a special relation. Traditionally, the Commerce Clause has impinged on a state's levy of tax only when such tax discriminates against or prohibits interstate activities or places interstate commerce at a disadvantage relative to local commerce. See, Central Greyhound Lines v. Mealey,

334 U.S. 653, 92 L. Ed. 1633, 68 S. Ct. 1260 (1948). If no such discriminatory effect exists, the state is free to pursue its own fiscal policies unembarrassed by the United States Constitution.

In the present case, this Court is examining an apportioned income tax which the appellant submits offends the Commerce Clause when applied to its activities due to insufficient nexus. Such contention not only ignores the realities of the appellant's West Virginia business operations but also completely misinterprets the purpose and scope of the Commerce Clause's protection of interstate activities. This Court has repeatedly acknowledged that apportioned taxes do not offend constitutional limitations upon state interference with interstate commerce, since the apportionment formula is designed to reach only income attributable to intrastate activity and the nexus is inherent. In Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 3 L. Ed. 2d 421, 79 S. Ct. 357 (1959), this Court recognized that

while unapportioned taxes by their very nature create the possibility that interstate commerce may have to pay more than its fair share, apportioned taxes by design preclude such possibility. The apportionment formula of West Virginia's carrier income tax restricts its imposition to only that portion of appellant's income resulting from transportation activities wholly conducted in the State and thereby avoids any improper interference with interstate commerce.

Appellant makes no attempt to demonstrate how the lack of substantial nexus, it alleges, creates a constitutionally impermissible burden on its interstate activities. Appellee suggests that such demonstration is lacking because there can be no violation of Commerce Clause nexus requirements in properly apportioned taxes. This Court developed the substantial nexus requirement in Complete Auto, supra, to establish standards by which to determine whether an interstate activity was sufficiently connected to a taxing state to allow the full taxation

of both the intrastate and interstate aspects of the total activity. The substantial nexus test was therefore designed to examine the validity of an unapportioned state tax on total income earned from interstate commerce. West Virginia's carrier net income tax is apportioned so that only the intrastate aspects of appellant's interstate business are subject to the tax and the nexus is implicit in the operation of the tax.

In Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169, 93 L. Ed. 585, 69 S. Ct. 432 (1949), this Court reviewed an ad valorem tax on barge companies by the State of Louisiana. The operations of the barge companies in Louisiana were virtually identical to appellant's West Virginia activities in this case. This Court found sufficient nexus for the imposition of Louisiana's ad valorem tax noting that prior cases which reached different conclusions did not address taxes which involved the element of apportionment. The Court concluded that properly apportioned taxes could not

reach property or business activities occurring beyond a state's borders and therefore the risk of multiple taxation which impaired interstate commerce was eliminated.

In Mobil Oil Corp. v. Commissioner of Taxes of Vermont, 445 U.S. 425, 63 L. Ed. 2d 510, 100 S. Ct. 1223 (1980), this Court recently reviewed the imposition of an apportioned income tax. With regard to the nexus requirement this Court held the following:

> "The requisite 'nexus' is supplied if the corporation avails itself of the 'substantial privilege of carrying on business' within the State: and '[t]he fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction.' Wisconsin v. J. C. Penney Co., 311 U. S. 435, 444-445 (1940)."

In an apportioned income tax case the nexus issue is properly resolved simply by determining whether a corporation is

exercising the privilege of carrying on business within the taxing state.

An examination of the facts of this case reveals that appellant has clearly availed itself of the substantial privilege of carrying on business within West Virginia. The West Virginia Supreme Court of Appeals reviewed the record in its decision and determined that appellant was engaged in substantial business activities in West Virginia. The lower court found that in addition to the actual operation of a portion of its interstate transportation business on the waterways of West Virginia, appellant conducted a wholly in-State transportation business as an accommodation to its interstate customers. Appellant, also, with respect to the one-point interstate business at issue, docked barges in West Virginia for extended periods and received demurrage income from State customers for the undue detention of such barges. The West Virginia Supreme Court further noted that during its transportation operations,

appellant purchased food and fuel in-State and used West Virginia as drop-off and pick-up points for its employees, some of which were State residents.

As the West Virginia Supreme Court has observed, the nexus issue is fact bound and its sufficiency must be determined on a case-by-case basis. The most definitive guidelines adopted by this Court to evaluate the adequacy of the nexus are found in Standard Pressed Steel Co. v. State of Washington Department of Revenue, 419 U.S. 560, 42 L. Ed. 2d 719, 95 S. Ct. 706 (1975). In that case this Court appraised the contact necessary for the State of Washington to levy its gross receipts privilege tax on sales made by an out-of-state manufacturer to an in-state customer. This Court held that when the in-state activity made possible the realization and continuance of valuable contractual relations, the nexus was more than sufficient. In the present case, it is obvious that without the use of the waterways of the State of West

Virginia that appellant could not maintain its valuable contractual relationships with West Virginia customers or in fact maintain any of its interstate transportation business. Appellant's income producing activity, the transportation of freight, occurs in West Virginia and only that portion occurring in West Virginia is subject to the tax. All the activities enumerated by the West Virginia Supreme Court as attendant to such in-State transportation also form a connection between West Virginia and appellant's operations. It is difficult to think of a situation where there is more nexus between a state and the activity taxed.

Appellant, while not denying its in-State business operations, argues that the nexus requirements demand a fixed presence in the taxing state in addition to the conducting of business activities within that state. Appellant thus argues the necessity of a fixed presence to tax a business activity which is characterized by movement, the transportation

of freight. This Court has made it abundantly clear that it will look at the "practical effect of a challenged tax" in reviewing its constitutionality. The appellee submits that it would be totally impractical for this Court to determine the validity of a tax levied on purely transportation operations on the basis of the location of the carrier's offices. West Virginia's carrier income tax imposes a tax on income derived from transportation activities and the nexus to support the levy of such tax must be determined with regard to the subject of the tax and not upon unrelated factors.

Appellant bases its fixed presence requirement on its interpretation of this Court's decision in National Bellas Hess, supra. A cursory examination of that decision reveals that no such fixed presence requirement could be construed from the holding in that case. National Bellas Hess involved an attempt by the State of Illinois to require an out-of-state mail-order house to collect use taxes. This Court found that Illinois

could not impose the burden of collecting use tax upon the interstate sales at issue because there was no minimum connection between the state and the out-of-state concern. This Court thus found that Illinois' attempted intrusion upon interstate commerce without any in-state connection to the person, property or transaction at issue other than by common carrier violated the Due Process Clause and the Commerce Clause. This Court, therefore, held that the nexus was lacking because the out-of-state mail-order house did not avail itself of the privilege of carrying on business in Illinois. In the instant case, it is equally clear that appellant does avail itself of the privilege of carrying on business in West Virginia and the nexus requirements are clearly satisfied.

Appellant also contends that West Virginia's carrier net income tax is not fairly related to benefits provided to it by the State. In Commonwealth Edison, supra, this Court established the relevant criteria for determining whether a

tax is fairly related to state benefits. In that case, this Court held that the measure of a tax must be reasonably related to the extent of the contact since it is the activities or presence of the taxpayer in the state that may properly be made to bear a just share of state tax burdens. This Court stated that when the measure of a tax is in proper proportion to a taxpayer's activities within the state, it is also in proper proportion to their consequent enjoyment of the opportunities and protections which the state has afforded in connection to those activities. The requisite relation to benefits test is succinctly stated in Commonwealth Edison, supra, as follows:

> "When a tax is assessed in proportion to a taxpayer's activities or presence in a State, the taxpayer is shouldering its fair share of supporting the State's provision of 'police and fire protection, the benefit of a trained work force, and "the advantages of a civilized society."' Exxon Corp. v. Wisconsin Dept. of Revenue, 447 U. S., at 228, quoting Japan Line, Ltd. v. County of

Los Angeles, 441 U. S., at 445."

The measure of West Virginia's carrier income tax is apportioned net income. Net income is apportioned so that only that portion of such income related to transportation activities occurring in West Virginia is taxed. The tax is therefore apportioned exactly to appellant's in-state business activities and as such is inherently related to benefits and protections provided by the State of West Virginia.

The West Virginia Supreme Court outlined the specific benefits derived by appellant from its in-State presence. Among those discussed were police and fire protection for appellant's personnel and property while engaged in business in this State and the inherent advantages accruing from a civilized society such as the use of State supported hospitals. This Court in Commonwealth Edison, supra, recognized that such benefits derived from the enjoyment of the privilege of

living in an organized society are the only benefits to which a taxpayer is constitutionally entitled.

Appellant, however, argues that such benefits are only incidental to its river travel and therefore not substantial. Such argument ignores the fact that the fair relation inquiry does not examine the value of benefits bestowed. Police and fire protection as well as other advantages of a civilized society are generally only indirectly related to a taxpayer's actual business activity. West Virginia's carrier income tax is not a user tax imposed for the direct use of State-owned facilities but is a revenue tax exacted for the general support of government. As a revenue tax there is no requirement that the carrier net income tax collected from a particular activity be substantially related to the services provided to that activity.

The foundation upon which appellant bases its entire constitutional attack upon West Virginia's carrier net income

tax as applied to its activities rests upon the premise that, because the navigable waterways of West Virginia are federally maintained, West Virginia has no right to tax activities occurring thereon. However, as the foregoing discussion has shown, such taxation does not violate constitutional protections of interstate commerce. No decision by this Court has ever limited a state to taxing only those activities occurring on state-owned or maintained property. If appellant's argument was extended, states would be prohibited from taxing interstate business activities occurring largely on privately owned property. Such an absurd extension of the constitutional protections of interstate commerce as proposed by appellant would greatly impair a state's ability to exact from interstate businesses its fair share of the cost of government.

CONCLUSION

Counsel for the appellee, Herschel H. Rose III, West Virginia State Tax

Commissioner, respectfully submits that the decision of the Supreme Court of Appeals of West Virginia is clearly correct; that this appeal does not present a substantial federal question; that the judgment below rests on an adequate nonfederal basis; and, that this Court should dismiss this appeal and affirm the decision below.

Respectfully submitted,

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